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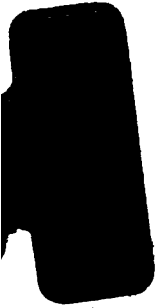
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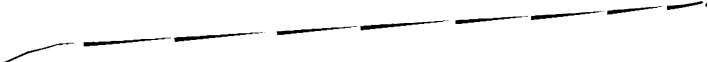
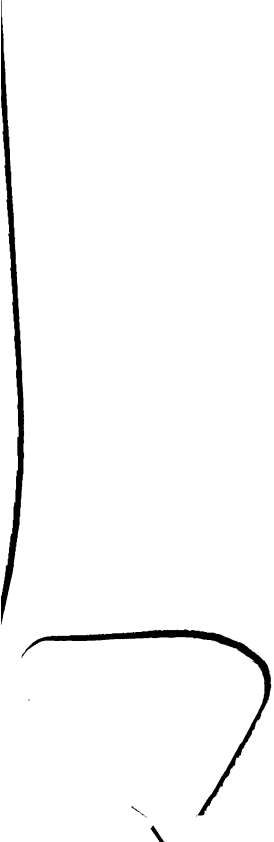
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PRINCIPLES
OF THE
LAW OF CONTRACT

WITH A CHAPTER ON THE
LAW OF AGENCY

BY
SIR WILLIAM R. ANSON, BART., D.C.L.
OF THE INNER TEMPLE, BARRISTER-AT-LAW
WARDEN OF ALL SOULS COLLEGE, OXFORD

fourteenth English Edition

THIRD AMERICAN COPYRIGHT EDITION
EDITED, WITH AMERICAN NOTES

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PREFACE TO THIRD AMERICAN EDITION

IN approaching the study of the law the student should be given some direction and assistance along two lines that generally have not been mentioned to him at all.

First, he should be warned that the law does not consist of a series of unchangeable rules or principles engraved upon an indestructible brass plate or, like the code of Hammurabi, upon a stone column. Every system of justice and of right is of human development, and the necessary corollary is that no known system is eternal. In the long history of the law can be observed the birth and death of legal principles. They move first with the uncertain steps of childhood, then enjoy a season of confident maturity, and finally pass tottering to the grave. It is during their middle period only that they can be used with confidence as the major premise of a deduction, to determine the legal relations of men in a particular case. The law is merely a part of our changing civilization. The history of law is the history of man and of society. Legal principles represent the prevailing *mores* of the time, and with the *mores* they must necessarily be born, survive for the appointed season, and perish.

Secondly, the student should be given certain fundamental legal conceptions described in definite terms without a shifting connotation. These concepts and these terms are the intellectual tools with which he is to construct and set forth his own system of legal principles, as well as the tools by which an instructor or text writer or judge constructs and inculcates his principle or system of principles. The more common legal concepts described by such terms as "contract," "property," "ownership," "trust," "obligation," are complex in character and their content is variable. Even so common a term as "right" can be shown to have at least half a dozen different meanings. Such terms and concepts are therefore wholly inadequate for clear thinking and accurate expression.

The truth of the warning as to the nature of law must be determined by each student anew for himself. This requires long

study and experience, a comparative study of cases both in books and in life. In this research he is seriously handicapped if he does not possess the tools mentioned in the preceding paragraph. The concepts and terms constituting these tools have long existed in the reasoning of our courts. It remained only to identify and isolate them and to "fix" the meanings of terms. Progress in this direction has been made by Terry, Salmond, and many others; but to the present editor it seems that more progress was made by his late colleague, Professor Wesley N. Hohfeld, than by others. In two articles, at present to be found only in magazine form, (1913) 23 Yale Law Journal, 16, and (1917) 26 Yale Law Journal, 710, Professor Hohfeld identified eight simple fundamental concepts, and fixed their meaning by setting them out in pairs of opposites and pairs of correlatives. His classification is as follows:

Correlatives:	right	privilege	power	immunity
	duty	no-right	liability	disability
Opposites:	right	privilege	power	immunity
	no-right	duty	disability	liability

The eight terms thus set out express purely mental concepts of the jural relations of human beings. It is the merit of Professor Hohfeld's articles, cited above, that they are rich in illustration of the uses of these concepts in actual judicial reasoning to be found in the law of property, contract, tort, and other legal fields. It is also their merit that they call sharp attention to the distinction between jural relations and the operative or causal facts of life that bring such relations into existence. Only an intensive and repeated study of these articles will show their full value; and only by repeated analysis of legal problems by means of the machinery there presented will the *practical* benefits of such analysis to lawyers and to clients be made fully apparent.

In the present edition, building upon the work of Sir William Anson and Dean Huffcut, the editor has introduced the terminology and analytical method above mentioned, so far as this seemed possible without too violent an alteration of the text or an undue expansion of the notes. This edition is based specifically upon the twelfth English edition, most of the changes of the English editor being incorporated. A considerable rearrangement of topics has seemed desirable in the latter half of the book, the text nevertheless remaining that of Sir William Anson and his English editor with the following exceptions. Cer-

tain merely verbal changes have been made in the interest of analytical consistency and clearness. Occasional additions to the text have been made for the same purpose or in order to state more fully the American law. The authorship of these additions is indicated by footnotes, the following sections being wholly the work of the present editor: 37a, 161-161b, 251a, 259a, 284-301, 353, 355-372, 373, 385, 386, 401.

No attempt has been made to differentiate between the work of Dean Huffcut and of the present editor in the footnotes. The citation of American cases is very largely the work of Dean Huffcut, although many recent cases have been added; the critical notes are almost always the work of the present editor. The section numbers as far as section 274 correspond with those of the previous edition; thereafter the topical rearrangement required entirely new numbering. Some sections dealing exclusively with English statutes are reduced to small type as in the previous edition.

A. L. C.

YALE UNIVERSITY SCHOOL OF LAW
January, 1919

PREFACE TO THE SIXTH EDITION

WHEN the subject of Contract was first introduced into the School of Jurisprudence at Oxford, in the year 1877, teachers of law had to consider the books which their pupils might best be directed to read. Some works on the subject, of acknowledged value to the practicing lawyer, were hardly suitable for beginners, and the choice seemed to lie between the works of Mr. Leake, Sir Frederick Pollock, and the late Mr. Smith. Of these, Mr. Smith alone wrote expressly for students, and I had, as a student, read his book with interest and advantage. But I thought that it left room for an elementary treatise worked out upon different lines.

Neither Sir Frederick Pollock nor Mr. Leake wrote for beginners, and I feared lest the mass of statement and illustration which their books contain, ordered and luminous though it be, might tend to oppress and dishearten the student entering upon a course of reading for the School of Law. Being at that time the only public teacher of English law in the University, I had some practical acquaintance with the sort of difficulties which beset the learner, and I endeavored to supply the want which I have described.

In working out the plan of my book I necessarily studied the modes of treatment adopted by these two writers, and I became aware that they are based on two totally different principles. Mr. Leake treats the contract as a subject of litigation, from the point of view of the pleader's chambers. He seems to ask, What are the kinds of contract of which this may be one? Then — What have I got to prove? By what defences may I be met? Sir Frederick Pollock regards the subject *ab extra*; he inquires what is the nature of that legal relation which we term contract, and how it is brought about. He watches the parties coming to terms, tells us how the contract may be made, and by what flaws in its structure it may be invalidated. Mr. Leake treats the subject from every point of view in which it can interest a litigant. Sir Frederick Pollock wrote a treatise on the Formation of Contract: only in later editions has he introduced a chapter on Performance.

To both these writers I must own myself to be under great obligations. If I try to apportion my gratitude, I should say that perhaps I obtained the most complete information on the subject from Mr. Leake, but that Sir Frederick Pollock started me on my way.

The object which I set before me was to trace the principles which govern the contractual obligation from its beginning to its end; to show how a contract is made, what is needed to make it binding, whom it may affect, how it is interpreted, and how it may be discharged. I wished to do this in outline, and in such a way as might best induce the student to refer to cases, and to acquire the habit of going to original authorities instead of taking rules upon trust. So I have cited few cases: not desiring to present to the reader all the modes in which principles have been applied to facts, and perhaps imperceptibly qualified in their application, but rather to illustrate general rules by the most recent or most striking decisions.

In successive editions I have made some changes of arrangement, and have tried to keep the book up to date. Since it first appeared, in 1879, the Legislature has been busy with the law of contract. The law relating to Married Women's Property, to Bankruptcy, to Bills of Exchange, to Partnership, to Mercantile Agency, has either been recast or thrown for the first time into statutory form: the effects of the Judicature Act in the general application of equitable rules and remedies have become gradually apparent in judicial decisions. Thus it has been necessary to alter parts of my book from time to time, but in this, the sixth, edition I have made many changes for the sake of greater clearness and better arrangement. The whole of the chapters on Offer and Acceptance, on the Effects of Illegality, on the Discharge of Contract by Breach, and a great part of the chapters on Mistake and Fraud, Infants and Married Women, have been rewritten, and the rest of the book has undergone many minor alterations as the result of a general revision.

I should add one word as to the place assigned to Agency. It is a difficult subject to put precisely where the reader would expect to find it. It is a mode of forming the contractual relation: it is also a form of the contract of employment. From the first of these points of view it might form part of a chapter on Offer and Acceptance, regarding the agent as a mode of communication; or it might form part of a chapter on the Capacity of Parties, regarding representation as an extension of contractual

capacity; or, again, it might form part of a chapter on the Operation of Contract, regarding agency as a means whereby two persons may make a contract binding on a third.

But upon the whole I think it is best to try and make the student understand that the agent represents his principal in virtue of a special contract existing between them, the contract of employment. There is a disadvantage, no doubt, in introducing into a treatise on the general principles of contract a chapter dealing with one of the special sorts of contract, but I believe that the student will find less difficulty in this part of the law if he is required to understand that the agent acquires rights and incurs liabilities for his principal, not in virtue of any occult theory of representation, but because he is employed for the purpose, by a contract which the law recognizes.

I should not close this preface without an expression of thanks to the friends who from time to time in the last ten years have helped me with suggestions or corrections of this book. To his Honor Judge Chalmers, to Sir Frederick Pollock, and in especial to the Vinerian Professor, Mr. Dicey, I owe much in the way of friendly communication on points of novelty or difficulty. Nor should a teacher of law be unmindful of his debt to the student. The process of explaining a proposition of law to a mind unfamiliar with legal ideas necessitates a self-scrutiny which is apt to lead to a sad self-conviction of ignorance or confusion of thought; and the difficulties of the learner will often present in a new light what had become a commonplace to the teacher. Therefore I would not seem ungrateful to the law students of Trinity College, past and present, whom I have tried, and sometimes not in vain, to interest in the law of contract.

I hope that the present edition of this book may be a little shorter than the previous one. I strongly desire to keep it within such limits as is proper to a statement of elementary principles, with illustrations enough to explain the rules laid down, and, as I hope, to induce the student to consult authorities for himself.

W. R. A.

ALL SOULS COLLEGE, *January, 1891*

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PART I.

INTRODUCTION

CHAPTER I

The Place of Contract in Jurisprudence

1. Outline of the subject. At the outset of an inquiry into the principles of the law of contract it may be well to state the nature of the inquiry, its main purposes, and the order in which they arise for discussion.

1. *Nature of contract.* First, therefore, we must ask what we mean by contract, and what is the relation of contract to other legal conceptions.

2. *Formation of contract.* Next we must ask how a contract is made; what things are needful to the formation of a valid contract.

3. *Operation of contract.* When a contract is made we ask whom it affects, or can be made to affect. This is the operation of contract.

4. *Interpretation of contract.* Then we inquire how the courts regard a contract in respect of the evidence which proves its existence, or the construction placed on its terms. This we may call the interpretation of contract.

5. *Discharge of contract.* Last we come to the various modes by which the contractual tie is unfastened and the parties relieved from contractual liability. This is the discharge of contract.¹

¹ The following analysis may be suggested, and is adhered to, in the main, in this edition:

1. *Nature of contract* : analysis and definition of terms and jural concepts.

2. *Formation of contract* : a discussion of the operative facts that induce organized society to create those legal relations defined as contractual. Such facts are offer, acceptance, consideration, delivery, etc.

3. *Operation of contract* : the legal relations of persons (including third persons) consequential upon the facts of formation and also upon subsequent operative facts. These legal relations are to be discovered partly by *interpretation*; they are determined also by subsequent facts, such as non-performance, impossibility, assignment, etc. This heading covers all the rules concerning performance and breach of contract.

THE NATURE OF CONTRACT

2. **The object of law.** The object of law is order, and the result of order is that men can look ahead with some sort of security as to the future. Although human action cannot be reduced to the uniformities of nature, men have yet endeavored to reproduce, by law, something approaching to this uniformity. As the law relating to property had its origin in the attempt to insure that what a man has lawfully acquired he shall retain; so the law of contract is intended to insure that what a man has been led to expect shall come to pass; that what has been promised to him shall be performed.

Such is the object of contract, and we have to analyze this conception, and ascertain and test the machinery by which men are constrained to keep faith with one another.

3. **Contract is agreement resulting in obligation.** Contract results from a combination of the two ideas of agreement and obligation. This statement must be limited to its application to a scientific system of jurisprudence in which rights have been analyzed and classified. The conception of obligation, as we understand it, was probably not clearly present to the minds of the judges who first enforced promises to do or to forbear; and we may be quite sure that they did not rest their decisions, as to the validity of such promises, upon agreement or the union of wills. But the analysis is none the less accurate because it has not always been made or understood.

4. **Discharge of contract:** the operative facts that extinguish pre-existing contractual relations.

Life is merely one fact after another; and a study of any branch of law involves the classification of these facts into those that are *operative* to create legal relations and those that are not, and the determination of legal relations that are consequent upon operative facts. The life history of a contract may be briefly indicated as follows: (1) Preliminary communications (not operative). (2) Offer, an act operating to create (3) a legal power in the offeree (as well as some other relations). (4) Acceptance, an operative act creating (5) new legal relations of numerous and complex sorts called "contract" — also "primary obligation." (6) Facts subsequent to formation but precedent to breach, some of which may be conditions precedent to the existence of (7) any duty of immediate performance and hence to a right of action for breach (e.g., tender, actual performance, continued life and health). (8) Breach, a fact operating to create new relations including (9) a duty to make reparation, often called "secondary obligation." (10) Facts discharging previous relations and re-establishing the *status quo ante* (so far, at least, as concerns the mere legal relations of the parties). See further the discussion at § 274a under the title "Operation of Contract."

Contract is that form of agreement which directly contemplates and creates an obligation; the contractual obligation is that form of obligation which springs from agreement. We should therefore try to get a clear idea of these two conceptions, and to this end Savigny's ¹ analysis of them may well be considered with reference to the rules of English Law.^a I will begin with his analysis of agreement.

1. Agreement

4. **Requisites of agreement.** 1. *Two or more persons.* Agreement requires for its existence at least two parties. There may be more than two, but inasmuch as agreement is the outcome of consenting minds the idea of plurality is essential to it.²

2. *Definite common intention.* The parties must have a distinct intention, and this must be common to both. Doubt or difference are incompatible with agreement. The proposition may be illustrated thus:

Doubt: "Will you buy my horse if I am inclined to sell it?" "Very possibly."

Difference: "Will you buy my horse for £50?" "I will give £20 for it."³

3. *Intention communicated.* The parties must communicate to one another their common intention. Thus a mental assent to an offer cannot constitute an agreement.^b ⁴ A writes to X

^a Savigny, System, § 140. 4.

^b See the dicta of Lord Blackburn in *Brogden v. Metropolitan Railway Company*, (1877) 2 App. Cas. 691. It appears from the records of the Proceedings in the House of Lords (Appeal Cases, 1877, vol. vii, pp. 98, 106) that Lord Coleridge, C.J., and Brett, J., had in giving judgment in the Common Pleas used language suggesting that an uncommunicated mental consent might create a binding agreement. Lords Selborne and Blackburn express their dissent from such a proposition, the latter very fully and decidedly.

¹ A German jurist (1779-1861), many of whose books have been translated into English.

² "It is a first principle, that in whatever different capacities a person may act, he can never contract with himself, nor maintain an action against himself. He can in no form be both obligor and obligee." Morton, J., in *Eastman v. Wright*, (1828, Mass.) 6 Pick. 316; *Gorham's Adm'r v. Meacham's Adm'r*, (1891) 63 Vt. 231.

³ It is perhaps better to say that there must be a definite common expression of intention; for if two parties agree in expression, they may be held bound by contract even though they differed materially in actual mental understanding.

⁴ "A mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unvinced mental determination." Folger, J., in *White v. Corlies*, (1871) 46 N.Y. 467. It has indeed been held that there must be some overt act of acceptance; but the law does not require that knowledge of this act shall always reach the offeror. See § 33.

and offers to buy *X*'s horse for £50. *X* makes up his mind to accept, but never tells *A* of his intention to do so. He cannot complain if *A* buys a horse elsewhere.

4. *Contemplating legal relations.* The intention of the parties must refer to legal relations: it must contemplate the assumption of legal rights and duties as opposed to engagements of a social character. It is not easy to prescribe a test which shall distinguish these two sorts of engagements, for an agreement may be reducible to a pecuniary value and yet remain outside the sphere of legal relations. The Courts must decide such matters, looking at the conduct of the parties and all the circumstances of the case, and applying their own knowledge of human affairs.¹

5. *Affecting the agreeing parties.* The consequences of agreement must affect the parties themselves.² Otherwise, the verdict of a jury or the decision of a court sitting *in banco* would satisfy the foregoing requisites of agreement.³

Agreement then is the expression by two or more persons of a common intention to affect their legal relations.

5. *Agreement a wider term than contract.* But agreement as thus defined by Savigny has a wider meaning, and includes transactions of other kinds than contract as we commonly use the term.

1. *Agreements not creating obligations.* There are agreements the effect of which is concluded so soon as the parties thereto have expressed their common consent in such manner as the law requires. Such are conveyances and gifts,^a wherein the

^a As to gift, see *Hill v. Wilson*, (1873) L.R. 8 Ch. 888.

¹ *Keller v. Holderman*, (1863) 11 Mich. 248; *McClurg v. Terry*, (1870) 21 N.J. Eq. 225. If the conduct and expressions of one party lead the other reasonably to believe that a contract is being offered and to assent to such a contract, a contractual obligation is formed irrespective of the actual but secret intention of the one whose conduct so misleads.

² But in the United States generally a contract may be made by *A* and *B* for the benefit of *C*, who may maintain an action upon it. See Chapter IX, *post*. It is not possible, however, for *A* and *B* by contract to impose duties upon *C*, unless one of them is *C*'s authorized agent. Chapter VIII, *post*. Furthermore, it is possible for *A* to undertake with *B* that *C* shall thereafter conduct himself in a particular manner. This puts no legal duty upon *C*; but if *C* does not conduct himself in the particular manner, *A* has committed a breach of contract.

³ A judgment of a court is treated as a quasi-contract, but is not of course the result of an agreement. *O'Brien v. Young*, (1884) 95 N.Y. 428; *Morley v. Lake Shore Ry.*, (1892) 146 U.S. 162. See for agreement among members of a committee not affecting the party claiming under the agreement, *Benton v. Springfield &c. Ass'n*, (1898) 170 Mass. 534.

agreement of the parties effects at once a transfer of rights *in rem*, and leaves no obligation subsisting between them.¹

2. *Agreements creating status or contingent obligations.* There are agreements which effect their purpose immediately upon the expression of intention; but which differ from simple conveyance and gift in creating further outstanding obligations between the parties, and sometimes in providing for the coming into existence of other obligations, and those not between the original parties to the agreement.

Marriage, for instance, effects a change of status directly the consent of the parties is expressed before a competent authority; at the same time it creates obligations between the parties which are incidental to the transaction and to the immediate objects of their expression of consent.²

So too a settlement of property in trust, for persons born and unborn, effects much more than the mere conveyance of a legal estate to the trustee; it imposes on him incidental obligations some of which may not come into existence for a long time; it creates possibilities of obligation between him and persons who

a *Moss v. Moss*, [1897] P. at p. 267.

¹ This distinction may be expressed as follows: A conveyance, whether by gift or for compensation, creates rights *in rem* and their corresponding duties. These rights and duties are not restricted to the contracting parties alone, but extend to all persons subject to law. Such rights and duties are therefore not contractual, because they exist otherwise than by consent. If an expression of assent creates only such rights and duties, it should be called conveyance or grant and not contract. An expression of assent may, however, confer upon one a right *in personam*, with a corresponding duty resting upon the other party alone; this is contractual. See Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *Yale Law Journal*, 16, 26 *id.* 710; Corbin, "Offer and Acceptance and Some of the Resulting Legal Relations," 26 *Yale Law Journal*, 163.

² Marriage is very generally declared by American statutes to be a "civil contract." It arises from expressions of mutual consent, in accordance with formalities prescribed by law. The ceremony creates a multitude of legal relations between the two parties, and between them and third persons, many of which they did not foresee or intend. The same is true of many business contracts, the difference being one of degree. Other differences are as follows: the age of consent is generally below the age of 21; the parties have no power of rescission; the provision in the Federal Constitution forbidding any state to impair the obligation of a contract does not forbid legislative divorces; statutes generally prescribe a public ceremony although they are often held to be directory only; the power to avoid for fraud is much more limited. See *Hulett v. Carey*, (1896) 66 Minn. 327; *Moss v. Moss*, [1897] P.D. 263; *Di Lorenzo v. Di Lorenzo*, (1903) 174 N.Y. 467; *Lyman v. Lyman*, (1916) 90 Conn. 399.

are not yet in existence. These obligations are the result of agreement. Yet they are not contract.¹

3. *Agreements not conforming to local law.* Savigny's definition would include agreements which, though intended to affect legal relations, fail to do so because they fail to satisfy some requirement of the law of the country in which they are made,² or become the subject of litigation.

6. *Characteristics of contract.* It remains to ascertain the characteristics of contract as distinguished from the forms of agreement just described.

1. *A promise essential.* An essential feature of contract is a *promise* by one party to another, or by two parties to one another, to do or forbear from doing certain specified acts. By a *promise* we mean an accepted offer as opposed to an offer of a promise, or, as Austin called it, a *pollicitation*.³

2. *Originates in an offer.* An offer must be distinguished from a statement of intention; for an offer imports a willingness to be bound to the party to whom it is made. Thus, if A says to X "I mean to sell one of my sheep if I can get £5 for it," there is a mere statement which does not admit of being turned into an agreement: but if A says to X "I will sell you whichever of my sheep you like to take for £5," we have an offer.⁴

3. *An accepted offer creates a promise.* A promise, again, must be distinguished from an offer. An offer becomes a promise by

¹ *Gilman v. McArdle*, (1885) 99 N.Y. 451; *Ahrens v. Jones*, (1902) 169 N.Y. 555.

As in the case of marriage, the difference is one of degree rather than of kind, such difference being considerably less. A conveyance in trust, accepted by the trustee appears to constitute what is elsewhere described as a *unilateral contract*. The fact that the court of equity was the court that first recognized and enforced the resulting legal relations and did this in favor of a third party beneficiary is no reason for refusing to use the word "contract." See §§ 277, 285, *Contracts for the Benefit of Third Persons*.

² *Union Nat. Bk. v. Chapman*, (1902) 169 N.Y. 538; *Pritchard v. Norton*, (1882) 106 U.S. 124; *Scudder v. Bank*, (1875) 91 U.S. 406.

It should be observed that acts of offer and acceptance may operate to create legal relations in one jurisdiction even though they do not in another jurisdiction. However, this is not the place to discuss complex questions in the conflict of laws. See *Union Trust Co. v. Grosman*, (1917) 38 Sup. Ct. 147, and comment thereon in 27 *Yale Law Journal*, 816.

³ This distinction is of doubtful value. By common usage, a promise is an expression leading another person justifiably to expect certain conduct on the part of the promisor. Such an expression is a promise, whether enforceable at law or not. It is indeed an essential element in every contract. Society does not guarantee the fulfillment of all expectations so induced. See also § 48, *infra*.

⁴ See § 64, sub-s. 4, *post*, "Invitations to treat."

acceptance: until acceptance it may be withdrawn, after acceptance its character is changed. If *A* says to *X* "I will sell you my horse for £50," and *X* says "Agreed," there is a promise by *A* to sell, a promise by *X* to buy, and a contract between the two.¹

4. *The law must attach an obligation to the promise.* To make that sort of agreement which results in contract, there must be (1) an offer, (2) an acceptance of the offer, resulting in a promise,^a and (3) the law must attach a binding force to the promise, so as to invest it with the character of an obligation. Or we may say that such an agreement consists in an expression of intention by one of two parties, of expectation by the other, wherein the law requires that the intention should be carried out according to the terms of its expression and the expectation thereby fulfilled.^b

^a It will be shown later that an offer may be of an act, and that the promise resulting from acceptance may be made by the acceptor.

^b Dr. Holland's view (*Jurisprudence*, ed. 11, p. 258) is that the law does not require contracting parties to have a common intention but only to seem to have one, that the law "must needs regard not the will itself, but the will as expressed." Our difference may be shortly stated. He holds that the law does not ask for "a union of wills" but only for the phenomena of such a union. I hold that the law does require the wills of the parties to be at one, but that when men present all the phenomena of agreement they are not allowed to say that they were not agreed.* For all practical purposes our conflict of view is immaterial. But, after all, it is the intention of the parties which the courts endeavor to ascertain; and it is their intention to agree which is regarded as a necessary inference from words or conduct of a certain sort. See *per Lord Watson* in *Stewart v. Kennedy*, 13 App. Cas. 106, at p. 123: "The appellant contracted, as every person does who becomes a party to a written contract, to be bound in case of dispute by the interpretation which a Court of Law may put upon the language of the instrument. The result of admitting any other principle would be that no contract in writing could be obligatory if the parties honestly attached in their own minds different meanings to any material stipulation."

* The present editor agrees with Dr. Holland. It is the *expression* of intention that is the operative act that creates the legal relations called obligation. It will be admitted that such expressions may not accurately represent the mental intent. To exclude all other evidence of such intent is to hold in fact that the intent is immaterial. It may be said that the purpose of the rule is to carry out the intentions of the parties actually existing in the great majority of cases; but it seems better to say that its purpose is to secure the fulfillment of the promisee's reasonable expectations as induced by the promisor's conduct. See *post*, § 31, note; also § 178. "The law imputes to a person an intention corresponding to the reasonable meaning of his words and actions." Leake, *Contracts* (6th ed.), p. 3. In *Becker v. London Assur. Corp.*, (1918, H. of L.) 117 L.T. 609, construing an insurance contract, Lord Sumner said: "I daresay few assured have any distinct view of their own on the point, and might not even see it, if it were explained to them, but what they intend contractually does not depend on what they understand individually."

¹ The author's illustration is doubtless correct, but this is because the words used by *A* are an elliptical form of expression for "I promise to sell you my horse in return for your promise to pay me £50 on delivery." Had *A* offered his promise to sell the horse in return for £50 cash, *X* could accept only by delivering the money and not by saying "agreed."

Contract then differs from other forms of agreement in having for its object the creation of an obligation between the parties to the agreement.

2. *Obligation*

7. *Nature of obligation.* Obligation is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group.^{a 1}

Its characteristics seem to be these.

1. *A control.* It consists in a control exerciseable by one or both of two persons or groups over the conduct of the other. They are thus bound to one another, by a tie which the Roman lawyers called *vinculum juris*, which lasts, or should last, until the objects of the control are satisfied, when their fulfillment effects a *solutio obligationis*, an unfastening of the legal bond. That this unfastening may take place in other ways than by fulfillment will be shown hereafter.^b

2. *Two definite parties.* Such a relation as has been described necessitates two parties, and these must be definite.

There must be two, for a man cannot be under an obligation to himself, or even to himself in conjunction with others. Where a man borrowed money from a fund in which he and others were jointly interested, and covenanted to repay the money to the joint account, it was held that he could not be sued upon his covenant. "The covenant to my mind is senseless," said Pollock, C.B. "I do not know what is meant in point of law by a man paying himself."^{c 2}

^a Savigny, *Obl. ch. i. ss. 2-4.*

^b *Infra*, Part IV.

^c *Faulkner v. Lowe*, (1848) 2 Ex. 595, and see *Hoyle v. Hoyle*, [1893] 1 Ch. (C.A.) 99.

¹ It is indeed hard to avoid the use of figurative language like this, and for merely literary purposes it is not desirable to avoid it. Nevertheless, an obligation is neither a rope nor a chain. After certain operative facts, called offer and acceptance, occur, they are followed by a group of legal relations. The term "obligation" is a term that is loosely used to refer to this group. The most important of these relations are the legal correlatives called *right* and *duty*. These legal relations are merely mental concepts of what organized society will do as a result of the facts of offer and acceptance and of subsequent facts. These concepts enable us to predict societal action and thus avoid trouble or gain advantage. Where one has a right and another owes a duty, we can foresee the sheriff. This is the "control" of which the author speaks.

² *Gorham's Adm'r v. Meacham's Adm'r*, (1891) 63 Vt. 231; *Eastman v. Wright*, (1828, Mass.) 6 Pick. 316.

There would be nothing unreasonable in holding that such an agreement creates legal relations between the one and the others, even though one cannot have a legal duty to *himself*.

And the persons must be definite. A man cannot be obliged or bound to the entire community: his duties to the political society of which he is a member are matter of public, or criminal law. Nor can the whole community be under an *obligation* to him: ¹ the rights on his part correlative to the duties owed to him would be rights *in rem*, would be in the nature of property as opposed to obligation. The word obligation has been unfortunately used in this sense by Austin and Bentham as including the general duty, which the law imposes on all, to respect such rights as the law sanctions. Whether the rights are to personal freedom or security, to character, or to those more material objects which we commonly call property, they impose corresponding duties on all to forbear from molesting the right. Such rights are rights *in rem*. But it is of the essence of obligation that the duties which it imposes are imposed on definite persons, and are themselves definite: the rights which it creates are rights *in personam*.²

3. *Definite duties.* The liabilities³ of obligation relate to

¹ A "whole community" in the sense of an organised political unit can be under an *obligation* to an individual, enforceable by the machinery and power of a larger political organization. Even if there be no such larger organization, the transaction is identical in form and is intended to have the same legal results. For example, a county may contract with an individual for the repair of a road, and the county will be under an obligation to pay. The individual's duty to repair is a contractual duty, and his failure to perform it is not a tort. So also, the United States may contract with an individual for the erection of a building; no one hesitates to call the existing relations a contract, and under normal conditions it will have exactly the same effects as if both parties were subject to a higher power. The individual is in such case bound in exactly the same way as he would be in the case of a contract with another individual; but his claim against the government will fail of fulfillment in case of repudiation. These relations, even though defective, are nevertheless to be classified among contracts and not under the heading of torts, of criminal law, or of property.

² For an accurate analysis of legal relations in general, and for an illuminating discussion of the terms "rights *in rem*" and "rights *in personam*," see Professor W. N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *Yale Law Journal*, 16, and 26 *id.* 710.

³ The term "liability" is one of at least double signification. In one sense it is the synonym of *duty*, the correlative of *right*; in this sense it is the opposite of *privilege* or liberty. If a duty rests upon a party, society is *now* commanding performance by him and threatening penalties. In a second sense, the term "liability" is the correlative of *power* and the opposite of *immunity*. In this case society is not yet commanding performance, but it will so command if the possessor of the power does some operative act. If one has a power, the other has a liability. It would be wise to adopt the second sense exclusively. Accurate legal thinking is difficult when the fundamental terms have shifting senses.

definite acts or forbearances. The freedom of the person bound is limited only in reference to some particular act or series or class of acts. A general control over the conduct of another would affect his status as a free man, but obligation, as was said by Savigny, is to individual freedom what *servitus* is to *dominium*. One may work out the illustration thus: I am owner of a field; my proprietary rights are general and indefinite; my neighbor has a right of way over my field; my rights are to that extent curtailed by his, but his rights are very definite and special. So with obligation. My individual freedom is generally unlimited and indefinite. As with my field so with myself, I may do what I like with it so long as I do not infringe the rights of others. But if I contract to do work for A by a certain time and for a fixed reward, my general freedom is abridged by the special right of A to the performance by me of the stipulated work, and he too is in like manner obliged to receive the work and pay the reward.

4. *Reducible to a money value.* The matter of the obligation, the thing to be done or forborne, must possess, at least in the eye of the law, a pecuniary value, otherwise it would be hard to distinguish legal from moral and social relations. Gratitude for a past kindness cannot be measured by any standard of value, nor can the annoyance or disappointment caused by the breach of a social engagement; and courts of law can only deal with matters to which the parties have attached an importance estimable by the standard of value current in the country in which they are.¹

Obligation then is a control exerciseable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value.²

8. *Sources of obligation.* We may note here the various sources of obligation.

1. *Agreement.* Obligation may arise from agreement. Here we find that form of agreement which constitutes contract. An offer is made by one, accepted by another, so that the

¹ The parties may fix a pecuniary value to the doing or forbearing of an act which would otherwise not be reducible to a pecuniary standard; as the forbearing of a personal habit, *Hamer v. Sidway*, (1891) 124 N.Y. 538; the naming of a child, *Wolford v. Powers*, (1882) 85 Ind. 294; *Gardner v. Denison*, (1914) 217 Mass. 492; or the making of an affidavit, *Brooks v. Ball*, (1820, N.Y.) 18 Johns. 337.

² For the meaning of obligation as used in the Constitution of the United States (Art. 1, sec. 10) see *Sturges v. Crowninshield*, (1819, U.S.) 4 Wheat. 122; *Walker v. Whitehead*, (1872, U.S.) 16 Wall. 314; *Robinson v. Magee*, (1858) 9 Cal. 81.

same thing is, by mutual consent, intended by the one and expected by the other; and the result of this agreement is a legal tie binding the parties to one another in respect of some future acts or forbearances.

2. *Tort.* Obligation may arise from delict, or, as English law calls it, from tort. This occurs where a primary right to forbearance has been violated; where for instance, a right to property, to security, or to character has been violated by trespass, assault, or defamation. The wrong-doer is bound to the injured party to make good his breach of duty in such manner as is required by law. Such an obligation is not created by the free-will of the parties, but springs up immediately on the occurrence of the wrongful act.^{a 1}

3. *Breach of contract.* Obligation may arise from breach of contract. While A is under promise to X, X has a right against A to the performance of his promise when performance becomes due, and to the maintenance up to that time of the contractual relation. But if A breaks his promise, the right of X to performance has been violated, and, even if the contract is not discharged, a new obligation springs up, a right of action, precisely similar in kind to that which arises upon a delict or breach of a general duty.

4. *Judgment.* Obligation may arise from the judgment of a court of competent jurisdiction ordering something to be done

a In an earlier edition (ed. 2, pp. 9-13) I discussed the views of Mr. Justice Holmes as to the nature of the contractual obligation, and of Dr. Holland as to its source: but these topics are better suited to a treatise on jurisprudence than to an elementary book on the law of contract, and they are now omitted from the text.

Mr. Justice Holmes (Common Law, p. 300) regards a contract as "the taking of a risk." He rigorously insists that a man must be held to contemplate the ultimate legal consequences of his conduct, and, in making a promise, to have in view not its performance but the payment of damages for its breach. I cannot think it desirable to push legal analysis so far as to disregard altogether the aspect in which men view their business transactions, and to treat contract as a wager in which performance is backed against damages. For Dr. Holland's view, see *ante*, § 6, note.

¹ Tort and breach of contract are alike breaches of *duty*, but in the case of tort the pre-existing duty of the wrong-doer was one that was shared by every other member of society; and the injured party whose right was violated had not merely one right, he had a multitude of rights. His rights and the correlative duties of others were "multital." The secondary right and duty, however, arising from the tort, are relations that exist between the two persons only. They are "unital." See Hohfeld, *loc. cit. supra*. In the case of a breach of contract, both the primary right and duty and the secondary right and duty are "unital."

Observe that this new secondary "obligation" is not a mere "right of action." It too is a *group* of legal relations, including rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities.

It is sometimes difficult to determine whether the obligation arises from tort or breach of contract. See *Rich v. New York Central &c. R.*, (1882) 87 N.Y. 382; *Freeman v. Boland*, (1882) 14 R.I. 39.

or forborne by one of two parties in respect of the other. It is an obligation of this character which is unfortunately styled a contract of record in English law. The phrase is unfortunate because it suggests that the obligation springs from agreement, whereas it is really imposed upon the parties *ab extra*.¹

5. *Quasi-contract*. Obligation may arise from quasi-contract. This is a convenient term for a multifarious class of legal relations which possess this common feature, that without agreement, and without delict or breach of duty on either side, *A* has been compelled to pay or provide something for which *X* ought to have paid or made provision, or *X* has received something which *A* ought to receive. The law in such cases imposes a duty upon *X* to make good to *A* the advantage to which *A* is entitled; and in some cases of this sort, which will be dealt with later, the practice of pleading in English law has assumed a promise by *X* to *A* and so invested the relation with the semblance of contract.²

6. *Annexed by law as incidental to agreement*. Lastly, obligation may spring from agreement and yet be distinguishable from contract. Of this sort are the obligations incidental to such legal transactions as marriage or the creation of a trust.³

It is no doubt possible that contractual obligations may arise incidentally to an agreement which has for its direct object the transfer of property. In the case of a conveyance

¹ A judgment is not a contract, within the provisions of the Federal constitution prohibiting state legislation impairing the obligation of contracts. *Morley v. Lake Shore Ry.*, (1892) 146 U.S. 162; *O'Brien v. Young*, (1884) 95 N.Y. 428. But a judgment on a contract is protected in the same manner as the contract itself. *Fiak v. Police Jury*, (1885) 116 U.S. 131; *Getto v. Friend*, (1891) 46 Kans. 24.

² "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contracts. Thus if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention." — *People v. Speir*, (1879) 77 N.Y. 144, 150. See also *Hertzog v. Hertzog*, (1857) 29 Pa. 465; *Columbus &c. Ry. v. Gaffney*, (1901) 65 Oh. St. 104. And see Woodward on Quasi-Contracts; Keener on Quasi-Contracts; Corbin, "Quasi-Contractual Obligations," 21 *Yale Law Journal*, 533.

³ *Maynard v. Hill*, (1887) 125 U.S. 190, 210-214; *Benjamin v. Dockham*, (1883) 134 Mass. 418; *Platner v. Patchin*, (1865) 19 Wis. 333 (obligations arising from marriage). *Hamer v. Sidway*, (1891) 124 N.Y. 538 (obligation arising from trust). Cf. § 5, and notes.

of land with covenants annexed, or the sale of a chattel with a warranty, the obligation hangs loosely to the conveyance or sale and is so easily distinguishable that one may deal with it as a contract. In cases of trust or marriage the agreement is far-reaching in its objects, and the obligations incidental to it are either contingent or at any rate remote from its main purpose or immediate operation.¹

In order, then, to keep clear of other forms of agreement which may result in obligation, we should bear in mind that to create an obligation is the one object which the parties have in view when they enter into that form of agreement which is called *contract*.

3. *Contract*

9. **Definition of contract.** And so we are now in a position to attempt a definition of contract, or the result of the concurrence of agreement and obligation: and we may say that it is an *agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.*²

¹ See *ante*, § 5, note.

² "It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other." Mr. Justice Washington in *Dartmouth College v. Woodward*, (1819, U.S.) 4 Wheat. 518, 656. For various definitions collected and discussed see *Justice v. Lang*, (1870) 42 N.Y. 493; and see *Wheeler v. Glasgow*, (1892) 97 Ala. 700.

The term contract has been used indifferently to refer to three different things: (1) the series of operative acts by the parties resulting in new legal relations; (2) the physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also as an operative fact in itself; (3) the legal relations resulting from the operative acts, consisting of a right or rights *in personam* and their corresponding duties, accompanied by certain powers, privileges, and immunities. The sum of these legal relations is often called "obligation."

The present editor prefers to define contract in sense (3) as the sum-total of those legal relations between persons arising from voluntary expressions of intention and agreement, and including at least one primary right *in personam* with its corresponding duty. It is not at all necessary that the exact character and content of the resulting legal relations should have been foreseen and intended by the parties.

PART II

THE FORMATION OF CONTRACT

CHAPTER II

10. Elements necessary to a valid contract. We have now to ascertain how contracts are made. A part of the definition of contract is that it is an agreement *enforceable at law*: it follows therefore that we must try to analyze the elements of a contract such as the law of England will hold to be binding between the parties to it.

We look in the first instance for:

1. A distinct communication by the parties to one another of their intention; in other words, offer and acceptance.

2. The presence of certain evidence, required by law, of the intention of the parties to affect their legal relations. This evidence is either (a) form, or (b) consideration.

If these two requisites are satisfied we have a contract which, *prima facie*, will hold, or at any rate we have the outward appearance of a contract; and yet some necessary elements of validity may be wanting. Such are:—

3. The capacity of the parties to make a valid contract.

4. The genuineness of the consent expressed in offer and acceptance.¹

5. The legality of the objects which the contract proposes to effect.

11. Results of their absence. Where all these elements co-exist, there is a valid contract: where one is absent the contract may be *unenforceable*, that is, valid but incapable of proof: or *voidable*, that is, capable of being affirmed or rejected at the option of one of the parties: or the transaction may be *void*, that is, destitute of legal effect, so that there is no contract in existence at all. It is, no doubt, technically inaccurate to say that the contract is void, when we mean that there is no contract,² but it is a convenient form of expression.

¹ But see note, § 176.

² But it would not be at all inaccurate to say that the *acts* of the parties are totally inoperative and void so far as concerns contractual relations. See *post*, §§ 16-20.

I. PROCEDURE

12. Importance of procedure. It may be useful to the student at this point, and before considering in detail the various elements of validity in contract, to take note of some rules of procedure, and some features of terminology which if not understood and kept in view may cause him difficulty and confusion of mind.

In working out the law of contract mainly with the aid of decided cases it is important to know so much of procedure as will inform us what it is that the parties are asking or resisting. Under the same conditions of fact a suitor may succeed if he asks for the remedy appropriate to his case, or fail if he seeks one that is not appropriate.

13. Possible remedies in contract. A plaintiff in an action on a contract may ask for one of five things:

Damages, or compensation for the non-performance of a contract: ¹

Specific performance, or an order that a contract should be carried into effect by the defendant according to its terms: ²

Injunction, or the restraint of an actual or contemplated breach of contract: ³

Cancellation, or the setting aside of a contract:

Rectification, or the alteration of the terms of a contract so as to express the true intention of the parties.⁴

The first of these is the remedy formerly given in the Common-Law Courts; the other remedies could only be obtained in the Court of Chancery as administering Equity. The Chancery did not give damages,⁵ but directed that certain things should be done or forborne, whereby the rights of the

^a A plaintiff may also ask for a Declaration from the Court as to the true terms of a contract or his rights under it. But this can scarcely be described as a "remedy." *Société Maritime v. Venus Co.*, (1904) 9 Com. Cas. 289. [See Professor E. M. Borchard, "The Declaratory Judgment," (1918) 28 *Yale Law Journal*, 1.]

^b The power of giving damages, conferred on the Chancery Courts in 1858 (21 & 22 Vict. c. 27), was rarely used.

¹ See §§ 401-408, *post*. The common-law remedy for breach of contract was a money judgment. The amount is generally called damages. There are some distinctions, however, among the common-law remedies in the actions of *covenant*, *debt*, and *assumpsit*. *Debt* is often as truly an action for specific reparation as is a bill in equity.

² The equitable remedy of specific performance takes two forms: first, the specific enforcement of an affirmative promise ("I will convey lot No. 1 to you"); second the specific enforcement of a negative promise ("I will not carry on any business enterprise on my adjoining lot No. 2"). The first is enforced by a mandatory decree and the second by a prohibitive decree. See §§ 408, 409, *post*.

parties were adjusted. The Judicature Acts now enable the High Court of Justice, the Court of Appeal, and every judge of those courts, to give effect to all equitable, as well as to all legal rights and remedies.^{a 1}

14. **Common-law remedy.** Nevertheless the remedy formerly given by the Common-Law Courts only is not only different in kind from the remedies formerly given in the Court of Chancery, but is administered on different principles.

If *A* has made a valid contract with *B*, he is entitled *as of right* to damages from *B* if *B* breaks the contract — the measure of damages is a topic to be dealt with hereafter — but it does not follow that he will get a decree for the specific performance of the contract, or an injunction to restrain *B* from doing such

a 35 & 37 Vict. c. 66, s. 24.

¹ Six American states (Alabama, Delaware, Mississippi, New Jersey, Tennessee, Vermont) still retain separate courts of equity and preserve with slight modifications the forms of pleading and practice peculiar to such courts. Eleven states (Florida, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, Pennsylvania, Rhode Island, Virginia, West Virginia), the District of Columbia and the United States unite both common law and equity jurisdiction in the same court, but retain a separate form of pleading and practice for equity cases. In all the other states the same court administers both law and equity, and the pleading and practice is the same for both classes of cases. (Louisiana, whose jurisprudence is derived from the civil law, requires a judge, where the positive law is silent, to proceed according to natural justice and reason or received usage.)

COMMON-LAW PROCEDURE. The common-law forms of action *ex contractu* were: (1) *covenant*, an action brought to recover damages for the breach of a contract under seal; (2) *debt*, an action brought to recover a specific sum of money due and owing from one person to another; this action was long restricted to the enforcement of unilateral contracts, the receipt of a *quid pro quo* by the defendant being necessary to the creation of a "debt"; (3) *assumpsit*, an action brought to recover damages for the breach of any contract not under seal. The actions of debt and assumpsit came, for historical reasons, to be used interchangeably in certain cases. [See *Slade's Case*, (1602) 4 Coke, 92b.] When *assumpsit* is used for the collection of a "debt," it is often called *indebitatus assumpsit*; this includes the so-called "common counts" for goods sold, for work and labor done, for money lent, etc. Both *debt* and *indebitatus assumpsit* have been used for the enforcement of non-contract debts as well as for debts arising by agreement. The common-law procedure with some statutory modifications is in force in Delaware, Florida, Illinois, Maine, Michigan, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia and the District of Columbia. Practice Acts more substantially changing the common-law procedure and approaching the reformed code procedure are in force in Alabama, Georgia, Maryland, Massachusetts, Mississippi, Tennessee, and Texas. In all the other states a code of procedure is in force which provides for a single form of action for all cases both at law and in equity. In the Federal courts the pleading in common-law actions conforms to that in force in the state in which the action is brought. The code procedure in Louisiana is founded on the civil law.

acts as would amount to its violation. An equitable remedy can never be claimed as of right.¹

15. Equitable remedies. Equitable remedies are limited partly by their nature, partly by the principles under which they have always been administered in the Chancery.

The remedy by specific performance is necessarily limited in application to cases in which a court can enforce its directions. Engagements for personal service illustrate the class of cases in which it would be neither possible nor desirable for a court to compel parties to a performance of their contract;² and where the contract is such that a court will not grant a decree for specific performance it will not, as a rule, grant an injunction restraining from breach.³

The principle on which equitable remedies are given imposes a further limit to their application. Their history shows that they are special interventions of the king's grace, where the common-law courts are unable to do complete justice. They are therefore supplemental and discretionary; they cannot be claimed as of right. The suitor must show that he cannot obtain otherwise a remedy appropriate to his case, and also that he is a worthy recipient of the favor which he seeks.

Hence we find that where damages afford an adequate remedy equity will not intervene, a rule which is constantly exemplified in cases where specific performance is asked for, and the suitor is told that damages will give him all the compensation which he needs.⁴ And again we find that the application of equitable remedies is affected by the maxim, "he who seeks equity must do equity." One who asks to have his contract canceled or rectified, on the ground that he has been the victim of mistake, fraud, or sharp practice (which is not technically the same as fraud), must show that his dealings throughout the transaction have been straightforward in every respect.⁴

^a *Infra*, §§ 408, 409.

¹ Whatever this may have meant in earlier times, at present it means only that certain facts will have an operative effect in equity that the common-law courts disregarded. If the required operative facts exist, the "right" in equity is just as certain as are rights at law.

² See *Cort v. Lassar*, (1889) 19 Ore. 221; *Wakeham v. Barker*, (1889) 82 Cal. 46; *Rogers Co. v. Rogers*, (1890) 58 Conn. 356; *Lumley v. Wagner*, (1852) 1 DeG. M. & G. 604.

³ See *Adams v. Messinger*, (1888) 147 Mass. 185.

⁴ *Goodenow v. Curtis*, (1876) 33 Mich. 505; *The Clandeboye*, (1895) 70 Fed. 631.

This rule applies to all equitable remedies, and should not be forgotten by the student. He will do well to inform himself, at the outset of a case, of the remedies which the parties seek; for a party to a suit may lose his case, not because he has no claim of right, but because he has sought the wrong remedy.

II. TERMINOLOGY

16. Void, voidable and unenforceable contracts. There are certain terms to which the attention of the student must be called, because they are of constant use in the law of contract, because they are not infrequently used with insufficient precision, and because they signify very real differences in the existing legal relations.

The terms are *void*, *voidable*, and *unenforceable*.

A void contract is one which is destitute of legal effect. Strictly speaking, "void contract" is a contradiction in terms; for the words describe a state of things in which, despite the intention of the parties, no contract has been made. Yet the expression, however faulty, is a compendious way of putting a case in which there has been the outward semblance without the reality of contract.¹

A voidable contract is one which one of the parties may affirm or reject at his option.

An unenforceable contract is one which is good in substance, though, by reason of some technical defect, one or both of the parties cannot sue upon it. Such a contract is sometimes called an agreement of imperfect obligation.

17. Void contracts. A void contract may be void on the face of it, or proof may be required to show that it is void. Where offer and acceptance do not correspond in terms,² or where there is an agreement to commit a crime,³ the transaction is plainly void. Where a contract is made under certain conditions of mistake,⁴ or where an infant makes a promise which Parliament has declared, in the case of infancy, to be void, it is necessary to prove in the one case the fact of mistake, in the other the fact of infancy.⁵ In default of such proof, such

¹ That is, there have been acts of offer and acceptance but no resulting contractual relations.

² *Rovegno v. Defferari*, (1871) 40 Cal. 459.

³ *Materne v. Horwitz*, (1886) 101 N.Y. 469.

⁴ *Walker v. Ebert*, (1871) 29 Wis. 194.

⁵ *Trueblood v. Trueblood*, (1856) 8 Ind. 195; *Slater Woollen Co. v. Lamb*, (1887) 143 Mass. 420.

a transaction, good upon the face of it, and not shown to possess any legal flaw, would be enforced by the courts.

But this does not alter the nature of the transaction, as will be seen when we compare that which is void, and that which is voidable.

18. Voidable contracts. When a contract is shown to be void it can create no legal rights. It is a nullity. But a voidable contract is a contract with a flaw of which one of the parties may, if he please, take advantage. If he chooses to affirm, or if he fails to use his power of avoidance within a reasonable time so that the position of parties becomes altered, or if he take a benefit under the contract, or if third parties acquire rights under it, he will be bound by it.

An illustration will show the essential difference between what is void and what is voidable.

(1) *A* sells goods to *X*, being led to think that *X* is *Y*: *X* sells the goods to *M*. The transaction between *A* and *X* is void, and *M* acquires no right to the goods.^{a 1}

(2) *A* sells goods to *X*, being led by the fraud of *X* to think that the market is falling. Before *A* has discovered the fraud or has acted on the discovery, *X* resells the goods to *M*, who is innocent of the fraud, and gives value for the goods. *M* acquires a good title to the goods, and *A* is left to his remedy against *X* by the action for deceit, an action *ex delicto*.^{b 2}

In the first of these cases the nullity of the contract prevents any rights arising under it when the mistake is proved. In the second there is a contract, and one capable of creating rights, and the person defrauded has a power to affirm or avoid, limited as above described.

19. Unenforceable contracts. The difference between what is voidable and what is unenforceable is mainly a difference between substance and procedure. A contract may be good, but incapable of proof owing to lapse of time, want of written form, or failure to affix a revenue stamp.³ Writing in the first

^a *Cundy v. Lindsay*, (1878) 3 App. Cas. 459.

^b *Babcock v. Lawson*, (1880) 4 Q.B.D. 394.

¹ See *Barker v. Dinsmore*, (1872) 72 Pa. 427; *Rodliff v. Dallinger*, (1886) 141 Mass. 1; *Edmunds v. Merchants' &c. Co.*, (1883) 135 Mass. 283.

² *Rowley v. Bigelow*, (1832, Mass.) 12 Pick. 307.

³ In the case of a *void contract*, the acts of the parties that would usually operate to create new contractual relations have no such operation. Rights will exist after such a transaction, but they will not be contract rights. A contract right is a primary right *in personam* arising from expressions of consent; the chief operative facts are expressions of agreement. In the

cases, a stamp in the last, may satisfy the requirements of law and render the contract enforceable, but it is never at any time in the power of either party to avoid the transaction. The contract is unimpeachable, only it cannot be proved in court.¹

20. *Confusions of terminology.* This much will suffice to guide the student as to the meaning of these terms, but he must be prepared to find their distinction obscured by laxity in the uses of the word "void."

Not only is the term "void contract" in itself technically inaccurate, but a contract is sometimes said to be void, not because it was destitute of legal effect from its commencement, but because it has been fully performed, and so has ceased to have legal operation. It would be more proper to describe such a contract as "discharged."

Again the word "void" has been used, even by judges and the framers of statutes, where "voidable" is meant. One illustration will suffice. By 17 *Geo. III*, c. 50, failure to pay

case of a void contract, there are such expressions; but they are not operative facts at all. Standing alone, they have no legal effect. They may, however, be accompanied by other facts, e.g. a delivery of goods, that have legal operation. The rights consequent upon a void contract are always primary rights *in rem*, or secondary rights *in personam* arising from a breach of a right *in rem*, or quasi-contractual rights *in personam* existing independently of any expression of consent.

In the case of a *voidable contract*, the acts of the parties operate to create new legal relations. These are usually described as including present rights and duties just as in the case of a valid contract, but subject to the power of avoidance at the will of one of the parties. Another way of describing a voidable contract is to say that there are no contractual rights or duties existing but that one of the parties has an irrevocable power to create them.

The term *unenforceable contract* includes both void contracts and voidable contracts after avoidance. The author uses the term so as to describe certain other legal relations. When a contract has become unenforceable by virtue of the statute of limitations, the obligor or debtor has a power to create a new right in the other party as against himself by a mere expression of his will and without going through the formalities of contract. He cannot, however, as in a voidable contract, destroy the existing rights of the other party or create new rights in himself as against that other. When a contract is unenforceable by reason of the statute of frauds, either party has the legal power to create rights as against himself by signing a written memorandum, he has no such power to create rights in his own favor. The case of the revenue stamp is somewhat different. In these cases a legal relation exists that is different from that existing in the case of a void contract or of a voidable one. It appears that this difference is not as the author says "mainly a difference between substance and procedure." The difference between a power to create a right against another person and a power to create a right against only oneself is not merely procedural.

¹ *Bird v. Munroe*, (1877) 66 Me. 337.

certain duties at an auction is stated to make a bidding, "null and void to all intents," but this does not entitle a purchaser who has repented of his bargain to avoid the contract by his own wrong, that is by refusal to pay the statutory duty. The contract is voidable at the option of the party who has not broken the condition imposed by law."¹

c. Malins v. Freeman, (1837) 4 Bing. N.C. 395.

¹ The term "void" is frequently used in statutes and contracts, and in the decisions of courts where the term "voidable" would be more accurate. In such cases the latter term is to be substituted in determining the meaning of the statute, contract or decision. *Van Shaack v. Robbins*, (1873) 36 Iowa, 201; *Ewell v. Daggs*, (1883) 108 U.S. 143; *Bennett v. Mattingly*, (1886) 110 Ind. 197; *Somes v. Brewer*, (1824, Mass.) 2 Pick. 184; *Anderson v. Roberts*, (1820, N.Y.) 18 Johns. 515; *Pearsoll v. Chapin*, (1862) 44 Pa. 9.

The offer may take the form, "I will promise you £50 if you will accept it," or, "I will accept £50 if you will promise it to me." In either case the promise must be made under seal if it is to bind the promisor.

In the first case assent is needed to turn the offer of a promise into a contract: for a man cannot be forced to accept a benefit.¹

In the second case acceptance takes the form of a promise to which assent has been secured by the terms of the offer.²

Services or goods are offered which no one expects to get for nothing. A man cleans my windows, blacks my boots, sends goods to my house, unasked; an act is offered for a promise; and one who is willing to accept these services or goods promises by his acceptance to pay their cost. But the circumstances must be such as to indicate a real acceptance of the offer; for I cannot be compelled to accept services against my will, nor to pay for the blacking of boots which I have no choice

^a *Townson v. Tickell*, (1819) 3 B. & Ald. 37.

(2) An offer whereby a power is conferred upon the offeree to create a duty in himself alone with a correlative right in the offeror.

(3) An offer whereby a power is conferred upon the offeree to create a right in himself alone with a correlative duty in the offeror.

(4) An offer giving to the offeree the power to create mutual rights in *personam* with their correlative mutual duties.

In each case both the offer and the acceptance are *acts*; in cases (2) and (3) one of those acts is a promise; in case (4) both acts are promises. Cases (2), (3), and (4) may all be put in form (1).

Illustrations of (2) and (3) as are follows: (2) *A* hands to *B* a chattel, saying, "This is yours when you promise me \$10." *Mactier v. Frith*, (1830, N.Y.) 6 Wend. 103. (3) *A* writes to *B*, "Let Harry have \$100 and I will repay it." *Bishop v. Eaton*, (1894) 161 Mass. 496; *Wheat v. Cross*, (1869) 31 Md. 99.

¹ "Rights" can often be conferred upon one without either his knowledge or consent although he may have the power to destroy them by renunciation. Such is the case where a deed is delivered in escrow by *A* to *C* for the benefit of *B*. See *Butler and Baker's Case*, (1591) 3 Coke, 25a; *Roberts v. Security Co.*, [1897] 1 Q.B. 111; *Xenos v. Wickham*, (1867) L.R. 2 H.L. 296. There is some doubt whether a *delivery* can be made without the assent of the one to whom it is tendered. If not, then the tender of delivery is the offer and the assent is the acceptance (but this assent is not necessarily that of the one who is to have *rights*). In the United States assent of the deliverer is generally supposed to be necessary. See *Meigs v. Dexter*, (1898) 172 Mass. 217; *Welch v. Sackett*, (1860) 12 Wis. 243; *Derry Bank v. Webster*, (1862) 44 N.H. 264; *Gorham's Adm'r v. Meacham's Adm'r*, (1891) 63 Vt. 231.

² If *A* merely says to *B* that he will accept the delivery of a sealed instrument in case *B* shall thereafter tender it, *A*'s statement has no legally operative effect whatever, with respect to the legal operation of the sealed document.

but to wear, merely because an enterprising tradesman insists on blacking them.¹

2. *Act for promise.* A man gets into a public omnibus at one end of Oxford Street and is carried to the other. The presence of the omnibus is a constant offer by its proprietors of such services upon certain terms; they offer an act for a promise; and the man who accepts these services promises by his acceptance to pay the fare when duly demanded.²

3. *Promise for act.* A man who loses his dog offers by advertisement a reward of £5 to any one who will bring the dog safe home; he offers a promise for an act; and when *X*, knowing of the offer, brings the dog safe home the act is done and the promise becomes binding.³

4. *Promise for promise.* *A* offers *X* to pay him a certain sum on a future day if *X* will promise to perform certain services for him before that day. When *X* makes the promise asked for he accepts the promise offered, and both parties are bound, the one to do the work, the other to allow him to do it and to pay for it.⁴

24. Unilateral and bilateral contracts. It will be observed that cases 2 and 3 differ from 4 in an important respect. In 2 and 3 the contract does not come into existence until one

¹ An illustration of a unilateral contract where the offeree assumes the duty is as follows: A dealer in horses says to *X*, pointing to a specific horse, "this horse is yours as he stands in return for your promise of \$100 in 30 days." If *X* makes the requested promise the contract is made and it is unilateral in character. It is an executed sale on credit without warranty. The thing offered is not strictly an *act*; it is the ownership of the horse. The dealer's offer confers upon *X* a power to make the horse his own by making the requested promise. No duty rests upon the offeror, and the offeree gets no right *in personam*. The offeror gains a right *in personam* and the offeree gets instantly certain rights *in rem*. See *Fogg v. Portsmouth Athenæum*, (1862) 44 N.H. 115.

No contract can be made by the offer of an *act* for a promise, for an act done before the return promise is made would be past consideration. See § 148. The illustrations given in the text are subject to this objection. In some such cases, no doubt there would be a legal duty to pay, quasi-contractual in character; in such cases the express promise seems to be almost superfluous. In other cases of this kind, it may be possible to infer mutual promises from the conduct of the parties, before the service is fully completed. The case would then belong to class 4.

² This case appears to fall within class (4) as a *bilateral* contract. If the car is a pay-as-you-enter, the money is offered for a promise to carry, and the case belongs in class (3).

³ *Reif v. Paige*, (1882) 55 Wis. 496; *Pierson v. Morch*, (1880) 82 N.Y. 503.

⁴ *White v. Corlies*, (1871) 46 N.Y. 467; *Boston & Maine R. v. Bartlett*, (1849, Mass.) 3 Cush. 224.

party to it has done all that he can be required to do. It is performance on one side which makes obligatory the promise of the other; the outstanding obligation is all on one side. In 4 each party is bound to some act or forbearance which, at the time of entering into the contract, is future: there is an outstanding obligation on each side.

In case 1 the promisee alone is benefited: in cases 2 and 3 the promisor and promisee alike take benefit, but the duty does not come into existence until the promisor has obtained all that he is to get under the contract: in case 4 the benefits contemplated by the parties are expressed in their mutual promises. We may, if we please, call 1, 2, 3, *unilateral*, and 4 *bilateral* contracts.¹

25. **Executed and executory consideration.** Where, as in cases 2 and 3, it is the doing of the act which concludes the contract, then the act so done is called an *executed*^a or present consideration for the promise. Where a promise is given for a promise, each forming the consideration for the other, such a consideration is said to be *executory* or future.

2. *An offer or its acceptance or both may be made either by words or by other conduct*

26. **Tacit contract.** The description which I have given of the possible forms of offer and acceptance shows that conduct

^a The words *executed* and *executory* are used in three different senses in relation to contract, according to the substantive with which the adjective is joined.*

Executed consideration as opposed to *executory* means *present* as opposed to *future*, an act as opposed to a *promise*.

Executed contract means a contract performed wholly on one side, while an *executory* contract is one which is either wholly unperformed or in which there remains something to be done on both sides. Leake (6th ed.), p. 6. Parke, B., in *Foster v. Dawber*, (1851) 6 Exch. 851.

Executed contract of sale means a *bargain and sale* which has passed the property in the thing sold, while *executory* contracts of sale are contracts as opposed to conveyances and create rights in *personam* to a fulfillment of their terms instead of rights in *rem* to an enjoyment of the property passed. Chalmers, *Sale of Goods Act* (7th ed.), pp. 9 & 10.

* This shows that the term "executed" is a slippery word. Its use is to be avoided except when accompanied by explanation. *Executed* consideration is also used to mean *past* consideration as opposed to *present* or *future*. See I Williston's *Cases on Cont.* 311. A contract is frequently said to be *executed* when the document has been signed, or has been signed, sealed, and delivered. Further, by *executed* contract is frequently meant one that has been fully performed by both parties.

¹ Langdell, *Summary of Law of Contract*, §§ 183-187. A promissory note is a good example of a unilateral contract. The mutual promises of a seller to deliver goods and of the buyer to pay for them when delivered, constitute a bilateral contract. It is quite possible for the sealed instrument in class (1) to be bilateral as well as to be unilateral. For other illustrations and discussion see Arthur L. Corbin, "Offer and Acceptance and Some of the Resulting Legal Relations," 26 *Yale Law Journal*, 169.

may take the place of written, or spoken words, in offer, in acceptance, or in both. A contract so made is sometimes called a *tacit* contract: the intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case.¹

27. Tacit offer. If *A* allows *X* to work for him under such circumstances that no reasonable man would suppose that *X* meant to do the work for nothing, *A* will be liable to pay for it. The doing of the work is the offer, the permission to do it, or the acquiescence in its being done constitutes the acceptance.^{a 2}

A common illustration is afforded by the sending of goods, and their use or consumption by the person to whom they are sent. The sending is the offer, the use or consumption is the acceptance, importing a promise to pay the price.^{b 3}

A ordered of *X* a publication which was to be completed in twenty-four monthly numbers. He received eight and then refused to receive more. No action could be brought upon the original contract because it was a contract not to be performed within the year, and there was no memorandum in writing which (as will be seen later) is required in such cases to satisfy the Statute of Frauds; but it was held that, although *A* could

^a *Paynter v. Williams*, (1833) 1 C. & M. 810. ^b *Hart v. Mills*, (1846) 15 M. & W. 87.

¹ The word "conduct" naturally includes words as well as other acts. The speaking or writing of words is merely a physical act expressing a thought. The nodding of the head is exactly the same. However, the distinction between *tacit* and express contracts is useful, though not nearly so vital as the distinction between unilateral and bilateral contracts or between true contracts and quasi-contracts. A *tacit* contract should never be confused with quasi-contracts.

"The term 'tacit contract,' suggested by Mr. Austin, describes a genuine agreement of this nature better than the phrase 'an implied contract'; for the latter expression is sometimes used to designate legal obligations which, in fact, are not contracts at all, but are considered so only by legal fiction, for the sake of the remedy." Smith, J., in *Bixby v. Moor*, (1871) 51 N.H. 402. See also *Heffron v. Brown*, (1895) 155 Ill. 322.

² *Day v. Caton*, (1876) 119 Mass. 513; *Curry v. Ourry*, (1886) 114 Pa. 367; *Hertsog v. Hertsog*, (1857) 29 Pa. 465; *Cicotte v. Church of St. Anne*, (1886) 60 Mich. 552; *Kiser v. Holladay*, (1896) 29 Ore. 338. In cases like this the obligation is more properly described as quasi-contractual than contractual. There may be no real consent or any conduct reasonably to be construed as such.

³ *Fogg v. Portsmouth Athenæum*, (1862) 44 N.H. 115; *Hobbs v. Massachusetts Whip Co.*, (1893) 153 Mass. 194. This is a unilateral contract. The sending of the goods in such a way as to indicate a willingness to transfer title in return for a promise is an offer. It creates in the offeree a legal power to cause a transfer of title to the goods and to create a right in *personam* in favor of the offeror and against the offeree.

not be sued on his promise to take twenty-four numbers, there was an offer and acceptance of each of the eight numbers received, and a promise to pay for them thereby created.^{a 1}

28. Tacit Acceptance. The offer may be made in words or writing and accepted by conduct. If *A* ask *X* to work for him for hire, or to do work for which payment would obviously be expected, *X* may accept by doing the work.²

But we must note that, in order to make a contract, there must be a definite request for the work to be done, and not a mere inquiry as to whether, or no, *X* would be willing to do the work.

And further, if *A* has prescribed a method of acceptance, or if the character of the contract makes it reasonable that acceptance should be signified by words or writing, then conduct alone will not suffice.^{b 3}

The ordinary case of an offer of reward for services or for information has been already referred to. A less familiar illustration is afforded by offers to grant property by deed or to dispose of it by will in favor of a man or woman in consideration of his or her marriage. Such an offer would become binding on the marriage of the person to whom the offer was made, whether it was made by a third party, or was a part of the terms on which two persons agree to marry.^{c 4}

Sometimes the inference from conduct is not so clear, but

^a *Mavor v. Pyne*, (1825) 3 Bing. 289. ^b *McIver v. Richardson*, (1813) 1 M. & S. 557.
^c *Hammersley v. de Biel*, (1845) 12 Cl. & F. 62. *Synge v. Synge*, [1894] 1 Q.B. 466.

¹ The legal relation here described is more properly called a quasi-contract than a true contract. The expressions of consent applied only to 24 numbers and the price thereof. The acts and words of the parties expressed no agreement to buy and sell 8 numbers. Further, the amount to be recovered for 8 numbers is not one third of the agreed price for 24 numbers. It is the reasonable value of 8 numbers, to be determined by the jury and not by the parties.

² *Campbell v. Mercer*, (1899) 108 Ga. 103.

³ See on this point *White v. Corlies*, (1871) 46 N.Y. 467.

⁴ The tacit acceptance in this case, expressed by the act of marrying as requested, creates a unilateral contract. The act of marrying is not only the mode of acceptance, but it is also the whole consideration in return for which the promise was offered.

A bilateral contract also may be made by means of a tacit acceptance. *A* writes *B* saying that he will convey Blackacre to *B* on June 1 if *B* will promise to pay \$1000 on June 1, and that *B* may indicate his acceptance by hanging a flag out of his window. If *B* hangs the flag as directed, a bilateral contract is created by means of the tacit acceptance.

The terms of the contract, however, are expressed in the words of *A*. In making a contract the parties may use any mode of expression known to man and understood by them.

the conduct of the parties may be inexplicable on any other ground than that they intended to contract. In the case of *Crears v. Hunter*,^a X's father was indebted to A, and X gave to A a promissory note for the amount due with interest payable half-yearly at five per cent. A thereupon forbore to sue the father for his debt. The father died, and A sued X on the note. Was there evidence to connect the making of the note with the forbearance to sue? In other words, did X offer the note in consideration of a forbearance to sue?

"It was argued," said Lord Esher, M.R., "that the request to forbear must be express. But it seems to me that whether the request is express or is to be inferred from circumstances is a mere question of evidence. If a request is to be implied from circumstances it is the same as though there was an express request."

The Court of Appeal held that the jury were entitled to infer a contract in which X made himself responsible for the debt if A would give time to the debtor.¹

3. *An offer is made when, and not until, it is communicated to the offeree*

This rule is not the truism that it appears.²

29. Ignorance of offered promise. X offers a promise for an act. A does the act in ignorance of the offer. Can he claim performance of the promise when he becomes aware of its existence?

The only English authority on this point is *Williams v. Carwardine*,^b where reward was offered for such information as might lead to the discovery of a murder, and the plaintiff gave information "believing she had not long to live, and to ease her conscience." Afterwards she recovered, and sued for the reward. It was held that she was entitled to it. Her claim was not contested on the ground that she was ignorant of the offer, but because the reward offered was not the motive of her act. The report is silent as to her knowledge of the offer, but in a reference to this case Hawkins J. (in a note to his judgment in *Carlill v. Carbolic Smoke Ball Co.*) said that he

^a (1887) 19 Q.B.D. 345.

^b (1833) 4 B. & A. 621.

¹ *Edgerton v. Weaver*, (1882) 105 Ill. 43; *Home Ins. Co. v. Watson*, (1874) 59 N.Y. 390. But see *Manter v. Churchill*, (1879) 127 Mass. 31; *Shupe v. Galbraith*, (1858) 32 Pa. 10.

² See for case of uncommunicated offer, *Benton v. Springfield &c. Ass'n*, (1898) 170 Mass. 534.

assumed that "the offer had been brought to the knowledge of the plaintiff before the information was given." ^a

An American case — *Fitch v. Snedaker* ^b — is directly in point. It is there laid down that a reward cannot be claimed by one who did not know that it had been offered. The decision seems undoubtedly correct in principle. One who does an act for which a reward has been offered, in ignorance of the offer, cannot say either that there was a *consensus* of wills between him and the offeror, or that his conduct was affected by the promise offered. On no view of contract could he set up a right of action. ^c ¹

30. Ignorance of offered act. A does work for X without

^a (1892) 2 Q.B. 490, n. 2.

^b (1868) 33 N.Y. 248.

^c The authority of the state courts on this point is not uniform. See *Ruling Cases*, vol. vi, p. 138, American notes, and cases there cited.

Gibbons v. Proctor, (1892) 84 L.T. 594, is the only English case which runs counter to the proposition which I have laid down, but I agree with Sir F. Pollock (8th ed., p. 22) that "it cannot be law as reported."

¹ The author's view is the one generally approved by legal theorists, but its correctness depends upon the basis of classification that one chooses to adopt and upon the purpose to be attained by means of contractual rules. The law creates many obligations because of acts or words of some person that were wholly unknown to the person affected by them, but these obligations are generally classified as quasi-contractual or as arising from tort. The leading purpose subconsciously underlying the law of contract is the prevention of disappointment in expectations caused by an expression of agreement by another person; and knowledge of such an expression or offer is necessary before our expectation can be said to be *caused* by it. If this is the only purpose, or if we desire to restrict the term contract to those cases where the act of the acceptor is induced by the offer and where such act of the acceptor is intended by him as an expression of agreement, then there can be no contract unless the offer is known to the acceptor. In harmony with this theory it is very generally held that one who gives information or performs an act in ignorance of an offered reward for such information or act cannot recover the reward. *Fitch v. Snedaker*, (1868) 33 N.Y. 248; *Howland v. Lounds*, (1873) 51 N.Y. 604; *Williams v. West, Chicago St. Ry.*, (1901) 191 Ill. 610; *Mayor v. Bailey*, (1873) 36 N.J. L. 490; *Stamper v. Temple*, (1845, Tenn.) 6 Humph. 113. In any event the information must be voluntarily imparted [*Vitty v. Eley*, (1900) 51 N.Y. App. Div. 44], and with a view to obtaining the reward [*Hewitt v. Anderson*, (1880) 56 Cal. 476], and must lead to arrest or conviction if such are the terms of the offer [*Williams v. Ry.*, (1901) 191 Ill. 610].

On the other hand, it may be argued that consent is necessary only on the part of one upon whom a *duty* is imposed, and that a *unilateral* contract can be made where any one has fulfilled the required conditions and given the expected consideration. See to this effect: *Gibbons v. Proctor*, *supra*; *Neville v. Kelly*, (1862) 12 C.B. (N.S.) 740; *Dawkins v. Sappington*, (1866) 26 Ind. 199; *Auditor v. Ballard*, (1873, Ky.) 9 Bush, 572; *Coffey v. Com.* (1896) 18 Ky. L.R. 646, 37 S.W. 575; *Russell v. Stewart*, (1872) 44 Vt. 170; *Stone v. Dysert*, (1878) 20 Kan. 123; *Cummings v. Gann*, (1866) 52 Pa. 484; *Smith v. State*, (1915) 38 Nev. 477. See 26 *Yale Law Journal*, 169, 182; 29 *Harvard Law Review*, 221; 1 *Cornell Law Quarterly*, 92.

the request or knowledge of *X*. Can he sue for the value of his work?

A man cannot be forced to accept and pay for that which he has had no opportunity of rejecting. Under such circumstances acquiescence cannot be presumed from silence. Where the offer is not communicated to the party to whom it is intended to be made, there is no opportunity of rejection; hence there is no presumption of acquiescence.

Taylor was engaged to command *Laird's* ship; he threw up his command in the course of the expedition, but helped to work the vessel home, and then claimed reward for services thus rendered. It was held that he could not recover. Evidence "of a recognition or acceptance of services may be sufficient to show an implied contract to pay for them, *if at the time the defendant had power to refuse or accept the services.*"^a Here the defendant never had the option of accepting or refusing the services while they were being rendered; and he repudiated them when he became aware of them. The plaintiff's offer being uncommunicated, did not admit of acceptance, and could give him no rights against the party to whom it was addressed.¹

31. Ignorance of one or more offered terms. Where an offer consists of various terms, some of which do not appear on the face of it, to what extent is an acceptor bound by terms of which he was not aware?

1. *General rule.* This question is answered, and the cases on the subject carefully summarized by Stephen, J., in *Watkins v. Rymill*.^b

"A great number of contracts are, in the present state of society, made by the delivery by one of the contracting parties to the other of

^a *Taylor v. Laird*, (1856) 25 L.J. Ex. 329.

^b (1883) 10 Q.B.D. 178.

¹ The weight of both English and American authority is probably still with the author; but the Roman and the Continental law both recognize an obligation in many such cases. This obligation, however, is not classified as contractual, but may properly be described as quasi-contractual. The trend of American law is without doubt in the direction of the Continental and Roman law. Cases allowing no recovery are: *Bartholomew v. Jackson*, (1822, N.Y.) 20 Johns. 28; *James v. O'Driscoll*, (1797, S.C.) 2 Bay, 101; *Thornton v. Village of Sturgis*, (1878) 38 Mich. 639; *New Orleans &c. R. v. Duncan*, (1894) 46 La. Ann. 155; *Boston Ice Co. v. Potter*, (1877) 123 Mass. 28. But one who finds another's lost property may recover for expenses incurred in preserving it. *Chase v. Corcoran*, (1871) 106 Mass. 286. Query whether a physician rendering services to an unconscious patient without request may recover the value of the services. *Brandner v. Krebs*, (1894) 54 Ill. App. 652; *Bishop on Contracts*, § 231. See *Keener on Quasi-Contracts*; *Woodward on Quasi-Contracts*.

a document in a common form stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered he is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents, or not."¹

Railway companies, for instance, make continuous offers to carry or to take care of goods on certain conditions. The traveler who takes a ticket for a journey, or for luggage left at a cloak-room, accepts an offer containing many terms. A very prudent man with abundance of leisure would perhaps inquire into the terms before taking a ticket. Of the mass of mankind some know that there are conditions and assume that they are fair, the rest do not think about the matter. The general rule, settled after the question had presented itself to the courts in many forms, is laid down in the passage above cited.^a We may take it that if a man accepts a document which purports to contain the terms of an offer, all the terms have been communicated to him, though he may not choose to inform himself of their tenor or even of their existence.²

2. *Exceptions.* The exceptions to this rule, apart from such

^a The conditions under which the liability of a railway company in respect to the carriage of goods can be limited, under 17 & 18 Vict. c. 31, are a matter too special to be discussed here.

¹ Cases of this sort show that in the law of contract, the rights and duties of the parties are determined by their expressions and not by their unexpressed intention. Frequently a contract is held to exist even though there was no real meeting of the minds in intention. In the law of contract as in the law of tort, men are expected to live up to the standard of the reasonably prudent man. If an offeror leads the offeree reasonably to understand that certain terms are being offered and he accepts them, a contract is made even though the offeror intended to make a different contract. So also, if an offeree accepts an offer without correctly understanding its terms, he is bound by the terms as offered if a reasonably prudent man in his place would have understood them. What the understanding of a reasonably prudent man would be is a question of fact to be determined by the court or the jury according to the usual rules. *Mansfield v. Hodgdon*, (1888) 147 Mass. 304. If there is a misunderstanding and neither party is negligent there is no contract. *Raffles v. Wichelhaus*, (1864) 2 H. & C., 906. The same is true if both are equally negligent. *Falck v. Williams*, (1900) A.C. 176. See *ante*, § 6, note, and *post*, §§ 178, 179, 186, 189.

² If the voucher or ticket is of a form indicating that it contains a contract the deliverer is presumed to have notice of its terms. *N.Y. Central R. Co. v. Beahan*, (1916) 37 Sup. Ct. R. 43; *Fonseca v. Cunard Steamship Company*, (1891) 153 Mass. 553; *Zimmer v. N.Y. Cent. & C. Ry.*, (1893) 137 N.Y. 460; *Ballou v. Earle*, (1891) 17 R.I. 441. But if given to the passenger in an envelope and his attention not called to the special contract, he is not bound. *The Majestic*, (1897) 166 U.S. 375.

a willful misstatement of conditions as would amount to fraud, fall under two heads.

(a) The offer may contain on its face the terms of a complete contract, and then the acceptor will not be bound by any other terms intended to be included in it.

Such a case was *Henderson v. Stevenson*.^a The plaintiff purchased of the defendant company a ticket by steamer from Dublin to Whitehaven. On the face of the ticket were these words only, "Dublin to Whitehaven"; on the back was an intimation that the company incurred no liability for loss, injury, or delay to the passenger or his luggage. The vessel was wrecked by the fault of the company's servants, and the plaintiff's luggage lost. The House of Lords decided that the company was bound to make good the loss, since the plaintiff could not be held to have assented to a term "which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him."¹

(b) Or again, the plaintiff may assert, not that the offer was complete upon its face, but that the mode of calling his attention to the terms which it included was not such as to amount to reasonable notice.

Parker v. South Eastern Railway Company^b was a case of deposit of luggage in a cloak-room on terms contained in a ticket. The conditions limiting the liability of the company were printed on the back of the ticket and were indicated by the words "See back" on the face of the ticket. The plaintiff, while he admitted a knowledge that there was writing on the ticket, denied all knowledge that the writing contained conditions. The Court of Appeal held that he was bound by the condition if a jury was of opinion that the ticket amounted to a reasonable notice of its existence.²

^a (1875) L.R. 2 H.L. 8c. App. 470.

^b (1877) 2 C.P.D. 416.

¹ If the document appears to be a mere voucher or receipt, the deliverer cannot be presumed to have notice that it contains a contract. *Brown v. Eastern R.*, (1853, Mass.) 11 Cush. 97; *Railway Co. v. Stevens*, (1877) 95 U.S. 655; *Quimby v. Vanderbilt*, (1858) 17 N.Y. 306; *Madan v. Sherard*, (1878) 73 N.Y. 329. There has been a sharp conflict of authority as to whether one accepting a bill of lading receipt is bound by all of its terms whether known or not. *Kirkland v. Dinsmore*, (1875) 62 N.Y. 171 (bound); *Railroad Co. v. Mfg. Co.*, (1872) 16 Wall. 318 (not bound unless expressly assenting).

² *Malone v. Boston & Worcester R.*, (1859, Mass.) 12 Gray, 388; *Blossom v. Dodd*, (1870) 43 N.Y. 264.

Richardson and others v. Rowntree^a illustrates the province of court and jury in these matters. A passenger sued for injuries sustained by the negligence of a steamship company; the company had limited its liability by a clause on the ticket which was printed in small type and further obscured by words stamped across it in red ink. The jury found that the plaintiff knew that there was writing on the ticket, that she did not know that the writing contained conditions relating to the contract of carriage, and that she had not received reasonable notice of these conditions. The Court of Appeal and House of Lords held that there was evidence to go to the jury and that the finding of the jury should not be disturbed.¹

32. **Offer under seal.** There is one exception to the inoperative character of an uncommunicated offer: this is the case of an offer under seal. Yet the party making such an offer cannot be said to be bound by contract, for this can arise only where an offer is accepted. He would seem to have made an offer which he cannot withdraw: and so the matter is best dealt with under the head of the revocation of offers.²

4. *Acceptance must be indicated by words or other overt action*

33. **Meaning of acceptance.** Acceptance means communicated acceptance. What amounts to communication, and how far it is necessary that communication should reach the offeror, are matters to be dealt with presently. It is enough to say here that acceptance must be something more than a mere mental assent.

In an old case it was argued that where the produce of a field was offered to a man at a certain price if he was pleased

^a [1894] A.C. 217.

¹ *Malone v. R.*, *supra*.

² To the American editor an offer under seal appears to be revocable, unless it contains a time limit either express or implied. If there is such a time limit, the delivery of the document creates the following legal relations: (1) a *power* in the offeree, with its correlative *liability* in the offeror; (2) a *right* in the offeree that his power shall not be terminated by revocation, with its correlative *duty* in the offeror. Or, if the author is correct, in place of (2) we find a *disability* in the offeror to revoke, with its correlative *immunity* in the offeree. Even if we hold that the offeree has as yet *no right*, it may still be justifiable to describe the document as a "contract" or "covenant," as well as an "offer"; for the offeree's power and immunity are even more valuable and effective than are a power and a right. See *Mansfield v. Hodgdon*, (1888) 147 Mass. 304. See further § 50, *post*.

with it on inspection, the property passed when he had seen and approved of the subject of the sale. But Brian, C.J., said:

"It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is a matter of fact."^a

This *dictum* was quoted with approval by Lord Blackburn in the House of Lords in support of the rule that a contract is formed when the acceptor has done something to signify his intention to accept, not when he has made up his mind to do so.^{b 1}

34. Mental acceptance ineffectual. A modern case will show that mental or uncommunicated consent does not amount to acceptance, and this is so even where the offeror has said that such a mode of acceptance will suffice.

Felthouse offered by letter to buy his nephew's horse for £30 15s., adding, "If I hear no more about him I shall consider the horse is mine at £30 15s." No answer was returned to this letter, but the nephew told Bindley, an auctioneer, to keep the horse out of a sale of his farm stock, as it was sold to his uncle Felthouse. Bindley sold the horse by mistake, and Felthouse sued him for wrongful dealing with his property. The Court held that as the nephew had never signified to Felthouse his acceptance of the offer, there was no contract of sale, and that the horse did not belong to Felthouse at the time of the auctioneer's dealings with it.^{c 2}

^a Year Book, 17 Ed. IV, 7.

^b 2 App. Cas. 692.

^c Felthouse v. Bindley, (1862) 11 C.B., (N.S.) 809.

¹ Acceptance may also be described as the exercise of a legal power conferred upon the offeree by the offeror. There is no doubt that the offeror may prescribe the mode in which this power must be exercised. The offeror is the creator of the power and can limit at will the power he creates. He may, and frequently does, dispense with the necessity of any communication to himself. In the absence of any mode specified by the offeror, the law will be satisfied with some reasonable mode; but in such case, a mere mental assent will never be held to be reasonable. Whether or not the offeror may dispense with any overt act expressing acceptance and specify mere silence with intent to accept as the mode of exercising the power is not well settled by authority. Some decisions seem to require an overt act in all cases. *Felthouse v. Bindley*, *infra*; *Royal Ins. Co. v. Beatty*, *infra*.

² Silence does not give consent, even though the offeror prescribes it as the mode of acceptance and the offeree intends it as an acceptance.

5. *Acceptance is effective when it is made in a manner prescribed, or indicated by the offeror*

35. **Effect of acceptance.** Contract is formed by the acceptance of an offer. When the offer is accepted it becomes a promise:¹ till it is accepted neither party is bound, and the offer may be revoked by due notice of revocation to the party to whom it was made. Acceptance is necessarily irrevocable, for it is acceptance that binds the parties.

36. **Mode of acceptance.** An offer is accepted when the acceptance is communicated, and we have seen that this means more than a tacit formation of intention. There must be some overt act or speech to give evidence of that intention. But there is this marked difference between communication of offer and communication of acceptance, that whereas an offer is not held to be communicated until it is brought to the knowledge of the offeree, acceptance may in certain circumstances be held to be communicated though it has not come to the knowledge of the offeror: a contract is thereby made.²

In such cases two things are necessary. There must be an express or implied intimation from the offeror that a particular

Prescott v. Jones, (1898) 69 N.H. 305. *A fortiori* is this true, if the offeror did not so prescribe and the offeree did not so intend. Royal Ins. Co. v. Beatty, (1888) 119 Pa. 6; Grice v. Noble, (1886) 59 Mich. 515; Raysor v. Berkeley Co., (1886) 26 S.C. 610; Clark v. Potts, (1912) 255 Ill. 183; Beach v. U.S., (1912) 226 U.S. 243. One cannot so frame his offer as to impose upon the offeree a liability to the creation of a contractual duty by mere silence. There may be, however, such a course of dealings between the parties as to cause silence and the retention of possession of goods to be equivalent to consent. Hobbs v. Massasoit Whip Co., (1893) 158 Mass. 194; Emery v. Cobbey, (1889) 27 Neb. 621; Hanson v. Wittenberg, (1910) 205 Mass. 319; Wheeler v. Klaholt, (1901) 178 Mass. 141; Ostman v. Lee, (1917, Conn.) 101 Atl. 23; Evans Piano Co. v. Tully, (1917, Miss.) 76 So. 833. The cases of Wheeler v. Klaholt and Evans Piano Co. v. Tully seem open to criticism, for the reason that although a distinct mode of acceptance was specified, it was never complied with, and the offeror had no reasonable ground for supposing that his offer had been accepted. See Recent Case Notes, 27 *Yale Law Journal*, 272, 561. Conduct which is as well referable to one state of mind as to another, or which is indecisive, is not assent. White v. Corlies, (1871) 46 N.Y. 467; Stensgaard v. Smith, (1890) 43 Minn. 11; Lancaster v. Elliott, (1887) 28 Mo. App. 86.

¹ But see § 6, *ante*.

² This use of the word "communicated" is open to some objection. To very many persons the word means that knowledge has been received. Frequently a contract is made even though the offeror has no such knowledge. In such case the acceptance is not "communicated" and yet it consummates the contract. See § 37, *infra*.

mode of acceptance will suffice. And some overt act must be done or words spoken by the offeree which are evidence of an intention to accept, and which conform to the mode of acceptance indicated by the offeror.

The law on this subject was thus stated by Bowen, L.J., in the *Carbolic Smoke Ball* case.^a

"One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so, the two minds may be apart, and there is not that *consensus* which is necessary according to the rules of English law — I say nothing about the laws of other countries — to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice *to himself* if he thinks it desirable to do so: and I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient *to act on the proposal* without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification."

37. Mode indicated by terms of offer. From this statement of the law we may draw the following conclusions.

The offeror may indicate a mode in which acceptance should be communicated, and he will then be bound by a communication so made, whether it reaches him or not: or the offeror may invite performance without communication of acceptance, and it will then be sufficient for the purpose of binding him that the offeree should "act on the proposal."

In either case we start with the general principle that acceptance must be communicated to the offeror, and we must then look to the terms and the nature of the offer, and ascertain whether the offeror has committed himself to a particular mode of acceptance, or has invited the offeree to act on the proposal and accept by performance.¹

37a. The Power of Acceptance. The forms it may take.²

^a [1893] 1 Q.B. 256, 269.

¹ See note to § 36, preceding page. We do not "start with the general principle that acceptance must be communicated to the offeror," but rather with the principle that the power of acceptance conferred by the offer must be exercised in accordance with its terms.

² This section is by the American editor.

No contractual relation can be formed without some voluntary act on the part of each of the two parties.

The first legally operative act is called an *offer* and it must be some expression denoting assent to the creation of a contract. This act of the offeror confers upon the offeree the legal power of bringing the contractual relations into existence by the performance of some voluntary act on his part. This second act is called *acceptance*, and generally it too must be some expression of assent. The performance of this act of acceptance is the exercise of the power conferred by the offeror.

In all contract cases the first question is what power has the offeror given to the offeree. First, he may have limited the power by requiring a particular mode of acceptance; if he has done so, no other mode will serve the purpose. Secondly, the offeror may have given an enlarged power, by suggesting and authorizing a certain mode of acceptance without making it the exclusive mode; in this case the offeree may accept in the manner suggested or by some other reasonable mode approved by law. Thirdly, the offeror may have specified no mode of acceptance whatever, either by way of requirement or of mere suggestion, although he has clearly indicated that the offeree may accept in some mode; in this case, the offeree may accept in any mode deemed reasonable by the law.

The foregoing rules are applicable to unilateral and bilateral contracts alike; but in their application certain distinctions are to be observed and some difficulties must be overcome. It is not always easy to determine what mode of acceptance the offeror has required or suggested; a *reasonable* construction must be put upon his words and other conduct. And if the offeror has neither required nor suggested a mode of acceptance, some mode considered reasonable *by the law* must be discovered. This will be found to be a mixed question of fact and of law, the solution varying with the circumstances.

(1) *A* offers to deliver his unilateral promise under seal to *B*. If the tender is made to *B* personally, *B* can accept only by receiving the document. If *A* delivers it to *C* to the use of *B*, it is *C*'s acceptance that binds *A*, subject to *B*'s later disavowal.¹

(2) *A* writes to *B* saying that he will accept *B*'s unilateral promise under seal, if *B* will deposit it in a certain box. *B* can accept by making the specified deposit.

¹ See *Butler and Baker's Case*, (1591) 3 Coke, 25a.

(3) *A* offers his unilateral promise of \$10 to *B*, in return for *B*'s act of destroying a certain noxious animal. *B*'s destruction of the animal is a sufficient acceptance.¹

(4) *A* offers to *B* the instantaneous conveyance of a certain chattel in return for *B*'s unilateral promissory note for \$10 executed and mailed to *A*. The contract is made when *B* mails the note.²

(5) *A* offers his promise to convey Blackacre to *B* in return for *B*'s promise to pay *A* \$1000, and says that *B* may accept by hanging a flag out of his window. When *B* hangs out the flag, with intent to accept, a bilateral contract is made.

The offeror's words and conduct and the surrounding facts must all be considered in determining whether the offeree's power to accept must be exercised by the making of a promise or by some other act or forbearance. If the offeror requests a return *promise* of forbearance, an actual forbearance is no acceptance.³ Likewise if the offeror asks for a particular act or forbearance, mere words promising to do that act or to forbear will constitute no acceptance. In determining doubtful cases of this sort, the courts seem to lean toward the conclusion that the offeror asked for a return promise, and therefore that mere promissory words of acceptance are sufficient and also necessary.⁴

¹ *Williams v. Carwardine*, (1833) 4 B. & Ad. 621; *Biggers v. Owen*, (1887) 79 Ca. 658; *Shuey v. U.S.*, (1857) 92 U.S. 73; *Williams v. West Chi. St. Ry. Co.*, (1901) 191 Ill. 610 (all these being cases of a reward for information or an arrest in criminal cases).

² See *Wheat v. Cross*, (1869) 31 Md. 99; *Mactier v. Frith*, (1830, N.Y.) 6 Wend. 103.

Where *A* has delivered goods to *B* "on sale or return" it is provided by the English Sale of Goods Act, 1893, § 18, that the parties shall be regarded as intending title to pass when the buyer "signifies his approval or acceptance to the seller or does any other act adopting the transaction." So it was held in *Kirkham v. Attenborough*, (1896) 66 L.J. Q.B. 149, that a unilateral contract of sale was consummated when the buyer pledged the goods to a third person. In *Weiner v. Gill*, (1905) 74 L.J. K.B. 845, the goods were delivered "on sale for cash only or return," and the court held that pledging the goods to a third person did not complete the sale because the prescribed mode of acceptance was the payment of cash.

³ *Strong v. Sheffield*, (1895) 144 N.Y. 392; *Miles v. New Zealand Alford Est. Co.*, (1886) 32 Ch. D. 266. But cf. *Hay v. Fortier*, (1917, Me.) 102 Atl. 294, and comment thereon in 27 *Yale Law Journal*, 534. See also § 127 *post*, and notes.

⁴ *Mapes v. Sidney*, (1623) Cro. Jac. 683; *Therne v. Fuller*, (1616) Cro. Jac. 396; *Dunton v. Dunton*, (1892) 18 Vict. L.R. 114; *Lewis v. Atlas Mut. Life Ins. Co.*, (1876) 61 Mo. 534; *Wheeler v. Klaholt*, (1901) 178 Mass.

The question whether or not the acceptor must give notice of his acceptance and whether or not this notice must be received by the offeror is to be determined by the foregoing principles. The offeror may expressly require such notice, whether the contract is to be unilateral or bilateral, and may require that such notice be received by him before it can operate to form a contract. If the offeror makes no such requirement, it is nevertheless necessary in case the custom of mankind is such that it would be unreasonable to attempt to close the contract in any other way. It may be true that custom requires the starting of a notice in cases where the offeree is asked to undertake a duty by making a promise;¹ this is more doubtful where the offeree is asked to undertake no duty.

38. Acceptance by doing an act. Guaranty. We will take the latter class of cases first. It is sometimes impossible for the offeree to express his acceptance otherwise than by performance of his part of the contract. This is specially true of what are called general offers, offers made to unascertained persons, wherein performance is expressly or impliedly indicated as a mode of acceptance. An offer of reward for the supply of information or for the recovery of a lost article does not contemplate an intimation from every person who sees the offer that he intends to search for the information or for the article: he may have already found or become possessed of the thing required, and can do no more than send it on to the offeror.²

But when a specified individual receives an offer capable of acceptance by performance we need to consider more carefully the nature and terms of the offer, and whether they entitle the offeree to dispense with notice of acceptance.

If *A* tells *X* by letter that he will receive and pay for certain goods if *X* will send them to him, such an offer may be accepted by sending the goods.³ But if *A* tells *X* that he is prepared to guarantee advances made by *X* to *M*, notice of acceptance

² *Harvey v. Johnston*, (1848) 6 C.B. at p. 304.

141; *Martin v. Meles*, (1901) 179 Mass. 114; *Gordon Malting Co. v. Bartels Brewing Co.*, (1912) 206 N.Y. 541; *Sanford v. Brown Bros. Co.*, (1913) 208 N.Y. 90. In the following case the court refused to find a return promise by mere implication: *Lees v. Whitcomb*, (1828) 5 Bing. 34; 2 M. & P. 86.

³ This seems to have been so held as far back as the 15th century. See Y.B. 17 Edw. IV, 2, the case in which Brian, C.J. expressed the opinion that the devil himself has no knowledge of what the thoughts of a man may be. See quotation in § 33, *ante*.

² See *MacFarlane v. Bloch*, (1911, Ore.) 115 Pac. 1056.

is required. In such a case where *X* without notice to *A* advanced money to *M* and afterwards charged *A* upon *M*'s default, it was held that *X* should have notified his acceptance to *A*, and that for want of such notification no contract had been made.^{a 1}

39. Acceptance by making a promise. When we pass from offers of a promise for an act to offers of a promise for a prom-

^a *McIver v. Richardson*, (1813) 1 M. & S. 557.

¹ The case of *McIver v. Richardson*, *supra*, is properly sustainable on the ground that there was no offer at all, but only a letter of preliminary negotiation. There is a great difference of opinion as to whether a notice of acceptance is necessary to bind a guarantor. See Ames' Cases on Suretyship, 225, and notes. This difference is based partly on faulty analysis and partly on a disagreement in policy. The notice may be regarded either as the mode of acceptance, and therefore a fact operating to form the contract (or primary obligation), or as a subsequent fact that is precedent to any duty of immediate performance by the guarantor and hence a condition precedent to any right of action (or to the secondary obligation). It is required in the former sense only in case it is so prescribed by the offeror or by established custom. In the latter sense it may be required either by agreement of the parties or by construction of law.

Offer by creditor. If the offer is made by the creditor to the surety, in nearly all cases it will be necessary for the surety to give notice of acceptance. This is because his acceptance is to be an act whereby he undertakes a duty, a promissory act. See § 37 and § 39. Assuredly no further notice by the creditor is necessary in order to form a contract.

Offer by guarantor. (1) *Promise for act.* The offer by the guarantor must of necessity be an offer of a promise. He may request a non-promissory act in return. (a) This act may be the giving of credit to the principal debtor. The doing of this act (giving credit to *M*) is the acceptance of the offer, and no notice should be required. *Lennox v. Murphy* (1898) 171 Mass. 370; *Bishop v. Eaton*, (1894) 161 Mass. 496; *Powers v. Bumcratz*, (1861) 12 Ohio St. 273. The guarantor's duty to pay may still be subject to a constructive condition precedent that some notice be given. This may be notice that the requested credit has been given, or that the balance due is some specific amount, or that there has been default. See *Bishop v. Eaton*, *supra*; *Black v. Grabow*, (1914) 216 Mass. 516; *Davis S. M. Co. v. Richards*, (1885) 115 U.S. 524; *Evans v. McCormick*, (1895) 167 Pa. 247; *De Cremer v. Anderson*, (1897) 113 Mich. 578. Even before this notice, however, it is too late for the guarantor to withdraw; he is bound by a conditional contract. (b) The act requested may be the payment of money to the guarantor. The performance of his act involves notice perhaps; certainly no other notice is required. *Davis v. Wells*, (1881) 104 U.S. 159. (2) *Promise under seal.* The guaranty offered may be a sealed document. In such case it is binding as soon as delivered to the creditor or his representative. No notice is necessary, except possibly as a condition precedent to the secondary obligation, as explained above. See *Davis v. Wells*, *supra*; *Powers v. Bumcratz*, *supra*. (3) *Promise for a promise.* If the offer contemplates the undertaking of a return duty by the creditor, thus empowering the latter to make only a bilateral contract, a notice of acceptance will nearly always be necessary to the formation of a contract for the reasons set forth in §§ 37 and 39.

ise, that is from offers capable of being accepted by performance¹ to offers which require for their acceptance an expression of intention to accept,² we need no longer consider whether the offeror asks for any notification at all, but must ask how far he has bound himself as to the mode in which the acceptance should be communicated. If he requires, or suggests, a mode of acceptance which proves, as a means of communication, to be nugatory or insufficient, he does so at his own risk.

40. **Acceptance by use of post-office.** We obtain a good illustration of this rule in the case of contracts made by post.

(a) *Offer by post invites answer by post.* We may assume that an offer made by post invites an answer by post unless the intention should be otherwise definitely expressed.

"The post-office is the ordinary mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner."^a

The first thing to bear in mind is that an offer made to one who is not in immediate communication with the offeror remains open and available for acceptance until the lapse of such a time as is prescribed by the offeror, or is reasonable as regards the nature of the transaction. During this time the offer is a continuing offer and may be turned into a contract by acceptance. This is clearly laid down in *Adams v. Lindsell*.^b Lindsell offered to sell wool to Adams by letter dated 2d Sept., 1817, "*receiving your answer in course of post.*" An answer might have been received on the 5th if the letter had been properly directed; but it was misdirected and did not reach Adams till the 5th, and his acceptance, posted on the same day, was not received by Lindsell till the 9th. On the 8th, that is, before the acceptance had arrived, Lindsell sold the wool to others. Adams sued for a breach of the contract made by the letters of offer and acceptance, and it was argued on behalf of Lindsell that there was no contract between the parties till the letter of acceptance was actually received. But the court said:

^a Household Fire Ins. Co. v. Grant, (1879) 4 Ex. D. 216, at p. 233.

^b (1818) 1 B. & Ald. 681.

¹ Offers of a unilateral contract.

² Offers of a bilateral contract. This means a communication to the offeror of the intention to accept. No sort of offer can be accepted without "an expression of intention to accept." Observe, also, that a bilateral contract may frequently be made without any communication from the offeree to the offeror.

"If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs until the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is concluded by the acceptance of it by the latter."

Adams v. Lindsell establishes two points, first that the offer remains open for acceptance during a time prescribed by the offeror or reasonable under the circumstances; and secondly, that an acceptance in the mode indicated by the offeror concludes the contract.¹

(b) *Letter of acceptance lost or delayed.* The courts have shown some hesitation in applying this rule to cases where the letter of acceptance has been lost or delayed in transmission, and though the law is now settled in accordance with the principle set forth at the head of this section, it is worth noting the stages by which the result has been reached.

Dunlop v. Higgins^a was a case in which a letter of acceptance was delayed in the post, and the offeror repudiated the contract when the acceptance arrived. Lord Cottenham, delivering the judgment of the House of Lords, laid down a general rule:

^a (1848) 1 H.L.C. 381.

¹ The American cases are now uniformly agreed that if the acceptor is expressly or impliedly invited to use the post, the acceptance is complete when the letter of acceptance is mailed. *Taylor v. Merchants' Fire Ins. Co.*, (1850, U.S.) 9 How. 390; *Mactier v. Frith*, (1830, N.Y.) 6 Wend. 103; *McClintock v. South Penn Oil Co.*, (1892) 146 Pa. 144; *Northampton Ins. Co. v. Tuttle*, (1878) 40 N.J. L. 476. The fact that under the postal regulations a letter may be reclaimed by the sender, does not operate to change this rule. *McDonald v. Bank*, (1899) 174 U.S. 610. So if the offer is by telegraph the acceptance is complete when the telegram of acceptance is filed. *Minnesota Oil Co. v. Collier*, (1876, U.S. C.C.) 4 Dillon, 431; *Brauer v. Shaw*, (1897) 168 Mass. 198 [disregarding *M'Culloch v. Ins. Co.*, (1822, Mass.) 1 Pick. 278]; *Trevor v. Wood*, (1867) 36 N.Y. 307; *Haas v. Myers*, (1884) 111 Ill. 421. Whether the use of the telegraph is impliedly authorized is a question of fact. *Perry v. Mt. Hope Iron Co.*, (1886) 15 R.I. 380.

While the courts frequently search for an "implied authority" to accept by mail or by telegraph, there often seems to be no strong ground for inferring the existence of such an authority in fact. It seems better to say that where the offeror prescribes no mode of acceptance the offeree may adopt any reasonable mode, according to the "usage of trade" (*Dunlop v. Higgins, infra*), or "the ordinary usages of mankind" (*Henthorn v. Fraser, infra*). See 26 *Yale Law Journal*, 202-204.

"If the party accepting the offer puts his letter into the post on the correct day has he not done everything that he was bound to do? How can he be responsible for that over which he has no control?"

This language covers the case of a letter lost in the post, and this was what happened in *Colson's case*,^a but the Barons of the Exchequer were not prepared to follow to its results the reasoning of the Lords in the previous case. Colson applied for an allotment of shares: an allotment letter was posted and never reached him: later a duplicate letter was sent to him which he refused to treat as an acceptance, and the Court of Exchequer held that he was not bound, considering that in *Dunlop v. Higgins* the letter was not lost and that the case before them was not governed by any authority.

Harris' case^b was one in which a letter of acceptance was posted a few hours earlier than a letter containing a revocation of the offer. It was held that the contract was completed, beyond possibility of revocation, when the letter of acceptance was posted. But James and Mellish, L.JJ., were careful to reserve their opinion as to the case of a lost letter of acceptance.

The matter came to a final decision in the *Household Fire Insurance Co. v. Grant*.^c An offer was made to take shares under circumstances indicating that the answer was to come by post: it was accepted by letter, the letter never reached the offeror, and the Court of Appeals held that he was nevertheless liable as a shareholder.

"As soon as the letter of acceptance is delivered to the post-office the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offeror himself as his agent to deliver the offer and receive the acceptance."^{d 1}

(c) *Reason for rule that risk may be on offeror.* These last words are one way of stating the reason for throwing on the offeror rather than the acceptor the risk of an acceptance going wrong. The offeror may indicate or require a mode in which acceptance should be signified, and the post-office may be regarded as his agent to receive the acceptance, or it may be regarded as the ordinary channel of communication. This is the view expressed in the more recent case of *Henthorn v.*

^a (1871) L.R. 6 Ex. 108.

^b (1872) L.R. 7 Ch. 587.

^c (1879) 4 Ex. D. 216.

^d Per Thesiger, L.J.

¹ *Vassar v. Camp*, (1854) 11 N.Y. 441; *Chytraus v. Smith*, (1892) 141 Ill. 231; *Washburn v. Fletcher*, (1877) 42 Wis. 152.

Fraser.^a A written offer, delivered by hand, was accepted by post; it was held that the contract was concluded from the moment of such acceptance, and Lord Herschell said:

"I should prefer to state the rule thus: where the circumstances are such that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."¹

But the cases of contracts made by post are merely an illustration of the general rule that the offeror takes the risk as to the effectiveness of communication if the acceptance is made in a manner indicated by the offeror as sufficient. It would be hard on the acceptor if, having done all that was required of him, he lost the benefit of a contract because the offeror had chosen an insufficient mode of communication.

Suppose that X sends an offer to A by messenger across a lake with a request that A if he accepts will at a certain hour fire a gun or light a fire. Why should A suffer if a storm render the gun inaudible, or a fog intercept the light of the fire? If X sends an offer to A by messenger with a request for a written answer by bearer — is it A's fault if the letter of acceptance is stolen from the bearer's pocket?²

(d) *When risk on offeree.* But there is no lack of authority to show that an acceptance not made in the manner indicated by the offeror is not communicated. Hebb applied to the agent of a company for shares; the directors allotted shares to him but sent the allotment letter to their own agent for transmission to Hebb. Before the agent delivered the letter Hebb withdrew his offer. It was held that "if Mr. Hebb had authorized the agent of the company to accept the allotment on his behalf there would have been a binding contract, but he gave no such authority." Communication by the directors to their own agent was no communication to Hebb. Consequently he was entitled to withdraw his offer.^{b 3}

Again, X offered by post to take an allotment of shares

^a [1892] 2 Ch. 27, C.A. 33.

^b Hebb's case, (1867) L.R. 4 Eq. 9.

¹ *Contra*, *Scottish-American Mortgage Co. v. Davis*, (1903) 96 Tex. 504.

² Where a theatre manager made a written offer to an actor and the acceptance was placed in the letter-box of the manager in accordance with a usual, or occasional, practice, the contract was complete even though the acceptance was never received. *Howard v. Daly*, (1875) 61 N.Y. 362.

³ If the offer makes the receipt of the answer the required mode of acceptance, the letter of acceptance is at the risk of the offeree. *Lewis v. Browning*, (1881) 130 Mass. 173; *Haas v. Myers*, (1884) 111 Ill. 421.

in the London and Northern Bank. A letter of allotment was made out, and given to a postman to post. The postman had no business to receive letters for the post outside his ordinary duty of collection. He did not post the letter until, as was proved by the postmark, a revocation of X's offer had reached the bank, and the revocation was held to be good. Delivery into the hands of a postman was not the same as posting a letter, and so was not a communication of acceptance.^{a 1}

41. **Place of acceptance.** The rule that a contract is made *when* the acceptance is communicated involves as a result the further rule that a contract is made *where* the acceptance is communicated. This may be of importance when we inquire, as is sometimes necessary, what is the law which governs the validity of the contract or the procedure by which it may be enforced.

In *Cowan v. O'Connor*^b a contract was made by two telegrams — one of offer and one of acceptance. The amount at issue made it necessary that the whole cause of action should arise within the jurisdiction of the court (that of the City of London) in which the action was to be tried. The telegram of acceptance had been sent from the city, and the court held that the contract was there made, and that consequently the whole cause of action arose within the jurisdiction of the Lord Mayor's Court.²

^a *In re London and Northern Bank*, [1900] 1 Ch. 220.

^b (1888) 20 Q.B.D. 640.

¹ But delivery into the hands of a letter carrier whose duty it is to receive mail, is delivery to the post-office. *Pearce v. Langfit*, (1882) 101 Pa. 507. Deposit in a street letter box is sufficient. *Watson v. Russell*, (1896) 149 N.Y. 388. The letter however posted must be properly addressed and stamped. *Blake v. Hamburg &c. Co.*, (1886) 67 Tex. 160.

So much has been said about the necessity and propriety of mailing a letter of acceptance that courts are very likely to assume that an acceptance can be in no other mode. In the case of offers for an allotment of shares, such as *Re London and Northern Bank*, *Hebb's case*, *Household Ins. Co. v. Grant*, and *Colson's case*, all discussed in the text *supra*, it might well have been argued that no notice was necessary and that the contract was complete upon the passing and recording of the vote of allotment. The applicant offers his promise to pay, in return for the act of the company in making him a shareholder, — a unilateral contract. Would not the recorded vote of allotment make him a shareholder, with the power to vote and the right to dividends if any shall be declared? However this may be, the English courts are not likely to reverse their decisions.

² *Garrettson v. North Atchison Bank*, (1891) 47 Fed. 867; *Perry v. Mt. Hope Iron Co.*, (1886) 15 R.I. 380. So if an offer and acceptance are made by telephone the contract is made at the acceptor's end of the wire. *Bank v. Sperry Flour Co.*, (1903) 141 Cal. 314.

So too in the case of a contract made between parties some of whom are resident in England and some abroad, the contract has been held to be made in the country in which the signature of the last necessary party is affixed.^a

42. Can acceptance be revoked? There is a result following from the foregoing decisions which has been the subject of criticism. Acceptance concludes the contract; so if acceptance takes place when a letter is put into the post-office, a telegram revoking the acceptance would be inoperative, though it reached the offeror before the letter.¹ It is not easy to see how the English courts could now decide otherwise. Nor is it easy to see that any hardship need arise from the law as it stands. The offeree need not accept at all: or he may send a qualified acceptance, "I accept unless you get a revocation from me by telegram before this reaches you,"² or he may telegraph a request for more time to consider. If he chooses to send an unconditional acceptance there is no reason why he should have an opportunity of changing his mind which he would not have enjoyed if the contract had been made "*inter praesentes*."

6. *Offer creates no legal rights until acceptance, but may lapse or be revoked*

43. Lapse and revocation of offer. Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have lain till it has become damp, or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance.

Lapse

44. Lapse by death. The death of either party before acceptance causes an offer to lapse.³ An acceptance communicated

^a *Müller's Margarine Co. v. Inland Revenue*, [1900] 1 Q.B. 310.

¹ But if the mailing of the letter does not conclude the contract an intercepting telegram is effective. *Scottish-American Mortgage Co. v. Davis*, (1903) 96 Tex. 504.

² This would be wholly ineffective if the offeror has required an acceptance by mailing a letter; in such case the acceptance would be a conditional one. See § 59.

³ *Pratt v. Trustees*, (1879) 93 Ill. 475; *Twenty-third Street Baptist Church v. Cornell*, (1890) 117 N.Y. 601. *Wallace v. Townsend*, (1885) 43 Oh. St. 537; *Helfenstein's Estate*, (1875) 77 Pa. 328. So also insanity. *Beach v. First M.E. Church*, (1880) 96 Ill. 177.

to the representatives of the offeror cannot bind them. Nor can the representatives of a deceased offeree accept the offer on behalf of his estate. An order for goods does not create a claim for goods sold and delivered until the goods are delivered, and if the offeror die before delivery no action will lie against the estate of the deceased by reason of a subsequent delivery.^{a 1}

45. **Lapse by failure to accept in manner prescribed.** It has been shown that acceptance is communicated if made in a manner prescribed or indicated by the offeror.²

If the communication of the offer does no more than suggest a mode of acceptance, it would seem that the offeree would not be bound to this mode so long as he used one which did not cause delay, and which brought the acceptance to the knowledge of the offeror. A departure from the usual or the suggested method of communication would probably throw on the offeree the burden of insuring a notification of his acceptance. Subject to this an offer made by post might be accepted by telegram, or by messenger sent by train.

But if a mode of acceptance is prescribed and the offeree departs from this, it is open to the offeror to treat the acceptance as a nullity.³

Eliason offered to buy flour of Henshaw, requesting that an answer should be sent by the wagon which brought the offer. Henshaw sent a letter of acceptance by mail, thinking that this would reach Eliason more speedily. He was wrong, and the Supreme Court of the United States held that Eliason was entitled to refuse to purchase.

^a Bagel v. Miller, [1903] 2 K.B. 212.

¹ This is quite correct, if the proposed contract is to be unilateral, the required mode of acceptance being the *delivery* of the goods. But if, prior to the party's death, there was a completed bilateral contract to buy and to sell, the validity of such contract is not affected by the death. There is no inevitable necessity that the power of acceptance shall be terminated by death of the offeror; the German Civil Code, § 153, provides that such death shall not end the power, unless the contrary intention appears.

So also, the offer may in certain instances be irrevocable, by death or otherwise. See § 50, *infra*.

² This means: *effective* whether communicated or not.

³ An attempted acceptance made in the wrong manner or at the wrong time should be regarded as a counter offer, creating in its turn a power of acceptance in the original offeror. It has been suggested that in such case silence by the original offeror should be regarded as an acceptance. Phillips v. Moor, (1880) 71 Me. 78. See also German Civil Code, § 149; Swiss Code Oblig. § 5; Jap. Civil Code, Art. 522; Morrell v. Studd, [1913] 2 Ch. 648. *Contra*: Ferrier v. Storer, (1884) 63 Iowa, 484.

"It is an undeniable principle of the law of contract, that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from these terms invalidates the offer unless the same be agreed to by the person who made it." ^{a 1}

46. Lapse by failure to accept within time prescribed. Sometimes the parties fix a time within which an offer is to remain open; more often it is left to a court of law, in the event of litigation, to say what is a reasonable time within which an offer may be accepted. Instances of a prescribed time are readily supplied. "This offer to be left over till Friday, 9 A.M. 12th June," allows the offeror to revoke, or the offeree to accept the offer, if unrevoked, at any time up to the date named, after which the offer would lapse. ^{b 2}

An offer to supply goods of a certain sort at a certain price for a year from the present date ^c — an offer to guarantee the payment of any bills discounted for a third party for a year from the present date ^d — are offers which may be turned into contracts by the giving of an order in the one case, the discount of bills in the other. Such offers may be revoked at any time, except as regards orders already given or bills already discounted, and they will in any event lapse at the end of a year from the date of offer. ³

A promise to keep an offer open would be binding if a consideration is given in return for it, and not otherwise. The offeree in such a case is said to "purchase an option," that is, the offeror, in consideration usually of a money payment, binds himself not to revoke his offer during a stated period. In this case the offeror by his promise precludes himself from exercising his power to revoke the offer; but where he receives no consideration for keeping the offer open, he says in effect, "You may

^a *Eliason v. Henshaw*, (1819, U.S.) 4 Wheaton, 225.

^b *Dickinson v. Dodds*, (1876) 2 Ch. D. 463.

^c *G.N.R. Co. v. Witham*, (1873) L.R. 9 C.P. 16.

^d *Offord v. Davies*, (1862) 12 C.B., N.S. 748.

¹ *Eliason v. Henshaw*, (1819, U.S.) 4 Wheat. 225; *Horne v. Niver*, (1897) 168 Mass. 4 (where answer by telegram requested, letter insufficient).

² "A limitation of time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named." *Longworth v. Mitchell*, (1875) 26 Ohio St. 334, 342. See also *MacLay v. Harvey*, (1878) 90 Ill. 525.

³ *Cooper v. Lansing Wheel Co.*, (1892) 94 Mich. 272; *Schenectady Stove Co. v. Holbrook*, (1885) 101 N.Y. 45; *Schlee v. Guckenheimer*, (1899) 179 Ill. 593; *Hopkins v. Racine Iron Co.*, (1909) 137 Wis. 583.

accept within such and such a time unless in the mean time I have revoked the offer."¹

An instance of an offer lapsing by the efflux of a reasonable time is supplied by the case of the *Ramsgate Hotel Co. v. Montefiore*.^a Montefiore offered by letter dated the 28th of June to purchase shares in the company. No answer was made to him until the 23d of November, when he was informed that shares were allotted to him. He refused to accept them, and it was held that his offer had lapsed by reason of the delay of the company in notifying their acceptance.²

Revocation

47. General rules as to revocation of offer. (1) An offer may be revoked at any time before acceptance.

(2) An offer is made irrevocable by acceptance.

48. Revocation before acceptance. The first of these statements is illustrated by the case of *Offord v. Davies*.^b Messrs. Davies made a written offer to the plaintiff that if the plaintiff would discount bills for another firm, they (Messrs. Davies) would guarantee the payment of such bills to the extent of £600 during a period of twelve calendar months.

Some bills were discounted by Offord, and duly paid, but before the twelve months had expired, Messrs. Davies, the guarantors, revoked their offer and announced that they would guarantee no more bills. Offord continued to discount bills, some of which were not paid, and then sued Messrs. Davies on the guarantee. It was held that the revocation was a good

^a (1866) L.R. 1. Exch. 109.

^b (1862) 12 C.B., N.S. 748.

¹ *Weaver v. Burr*, (1888) 31 W.Va. 736; *Hayes v. O'Brien*, (1894) 149 Ill. 403. A purchase of one lot under a standing offer has been treated as a consideration for keeping the offer open during the rest of the time stipulated, but this is doubtful doctrine. *Cooper v. Lansing Wheel Co.*, (1892) 49 Mich. 272.

See *post*, § 51, note on "Irrevocable Offers."

² *Maclay v. Harvey*, (1878) 90 Ill. 525; *Minnesota Oil Co. v. Collier*, (1876, U.S.C.C.) 4 Dill. 431; *Ortman v. Weaver*, (1882) 11 Fed. 358; *Stone v. Harmon*, (1884) 31 Minn. 512; *Baker v. Holt*, (1882) 56 Wis. 100. As to when an offer of a reward would lapse, see *Loring v. Boston*, (1844, Mass.) 7 Met. 409; *Mitchell v. Abbott*, (1894) 86 Me. 338; *Matter of Kelly*, (1872) 39 Conn. 159. The doctrine that the offeror receiving an acceptance after the offer has lapsed should notify the offeree that the acceptance is too late [*Phillips v. Moor*, (1880) 71 Me. 78] must be regarded as doubtful [*Ferrier v. Storer*, (1884) 63 Iowa, 484; *Maclay v. Harvey*, *supra*], but it is expressly adopted by the Swiss Code of Oblig. § 5. See also § 45, *ante*, and note.

defense to the action. The alleged guarantee was an offer, extending over a year, of promises for acts, of guarantees for discounts. Each discount turned the offer into a promise, *pro tanto*, but the entire offer could at any time be revoked except as regarded discounts made before notice of revocation.^{a 1}

49. *Revocation ineffective after acceptance.* The second statement is illustrated by the *Great Northern Railway Company v. Witham*,^b a transaction of the same character. The company advertised for tenders for the supply of such iron articles as they might require between 1st November, 1871, and 31st October, 1872. Witham offered to supply them on certain terms, and his tender was accepted by the company. Orders were given and executed for some time on the terms of the tender, but after a while Witham refused to execute orders. The company sued him for non-performance of an order given, and he was held liable.

It is important to note the exact relations of the parties. The company by advertisement invited all dealers in iron to make offers. The tender of Witham was an offer which might be accepted at any time, or any number of times in the ensuing twelve months. The acceptance of the tender did not make a contract, it was merely an intimation by the company that they regarded Witham's tender as an offer. The company were not bound to order any iron: and Witham might, at any time before an order was given, have revoked his offer by notice to the company: but each order given was an acceptance of Witham's standing offer, and bound him to supply so much iron as the order comprised.²

^a It should be noticed that in the judgment in *Offord v. Davies*, and also to a less extent in the *Great Northern Railway Company v. Witham*, the word "promise" is used where "offer of promise" is clearly meant. A revocable promise is unknown to our law. A promise may be void, voidable, or unenforceable from defects in the formation of the contract, or it may be discharged by some subsequent event, but a promise, whether actionable or not, is not revocable at the pleasure of the promisor.^{*}

^b (1873) L.R. 9 C.P. 16.

^{*} The present editor prefers to follow the usage of the courts in this matter. See § 6, *ante*.

¹ *Fisher v. Seltzer*, (1854) 23 Pa. 308 (retraction of bid at auction); *Head v. Clark*, (1890) 88 Ky. 362 (same); *White v. Corlies*, (1871) 46 N.Y. 467 (order for work countermanded); *Travis v. Nederland &c. Co.*, (1900) 104 Fed. 486 (second offer modifying first); *Shuey v. United States*, (1875) 92 U.S. 73 (withdrawal of offer of reward); *Biggers v. Owen*, (1887) 79 Ga. 658 (same).

² See *Cooper v. Lansing Wheel Co.*, (1892) 94 Mich. 272.

These cases present some difficulties. (1) *A* makes to *B* an offer to furnish *B* with such goods or services as *B* may order for a definite period at

An order given after 31st October, 1872, would have been an acceptance after the prescribed time, and inoperative.^a

50. Offer under seal is irrevocable. An exception to this

^a There are two later cases in which the conditions were similar to those above described, though the point in issue was not the same; in neither case was the principle above laid down impugned. In *Ford v. Newth*, [1901] 1 K.B. 690, the question to be decided was whether a man whose tender had been accepted by a corporation possessed an "interest in a contract" which under § 12 of the Municipal Corporations' Act, 1882, would disqualify him for election as a Councillor. Mr. Newth had made a tender; it was accepted; orders had been given and executed; and money was actually due to him from the Corporation at the date of his Candidature. The judges had no difficulty in deciding that he had a disqualifying interest; but their language tends somewhat to obscure the effects of the legal relation arising from the acceptance of a tender. In *R. v. Demers*, [1900] A.C. 103, the Judicial Committee were careful not to admit the existence of a contract, and merely held that the acceptance of a tender did not involve a duty to give orders to the person making the tender.

a specified price, and *B* "accepts." There is no contract, because *B* does not bind himself even contingently to order any goods or services, and therefore furnishes no consideration for *A*'s promise. *B*'s apparent promise contained in his acceptance is illusory, and gives to *A* no more ground for expecting action by *B* than existed before the giving of the promise. Performance by *B* rests just as before in his own will and desire. *Chicago &c. Ry. v. Dane*, (1870) 43 N.Y. 240; *Thayer v. Burchard*, (1868) 99 Mass. 508; *Teipel v. Meyer*, (1900) 106 Wis. 41; *Petroleum Co. v. Coal &c. Co.*, (1890) 89 Tenn. 381; *American Oil Co. v. Kirk*, (1895) 68 Fed. 791. But while the offer is outstanding an order given by *B* is an acceptance *pro tanto* and completes the contract to that extent. *Great Northern Ry. v. Witham* (text); *Keller v. Ybarra*, (1853) 3 Cal. 147; *Cases supra*. This is because *A*'s offer was evidently intended to create a power in *B*, but in order to exercise this power *B*'s act must supply consideration. If *B* orders a specified amount of goods or service, there is an implied promise to pay for them at specified rates, thus completing a bilateral contract. If *B* incloses the agreed price with his order, the contract becomes unilateral on receipt of the money. This construction of the offer creates in the offeree the power to make a series of separate contracts by separate acceptances. That these acceptances must be within the specified time, or if none is specified, then within a reasonable time, see *Chicago &c. Ry. Co. v. Dane, supra*.

(2) *A* makes to *B* an offer to furnish *B* with all the goods of a specified kind that *B* may need in a particular business during a definite period, and *B* accepts the offer; or *B* makes an offer to purchase such goods as he may need in such business, and *A* accepts the offer. This is a contract, because *B* binds himself, although contingently, to buy of *A*. If *B* needs such goods in that business and buys elsewhere, there is a breach of contract. *Lima Loco. and M. Co. v. Nat'l Steel Castings Co.*, (1907, C.C.A.) 155 Fed. 77; *National Furnace Company v. Keystone Mfg. Co.*, (1884) 110 Ill. 427; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, (1896) 160 Ill. 85; *Wells v. Alexandre*, (1891) 130 N.Y. 642; *Hickey v. O'Brien*, (1900) 123 Mich. 611; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, (1903) 121 Fed. 298. *Contra*, *Bailey v. Austrian*, (1873) 19 Minn. 535; *Drake v. Vorse*, (1879) 52 Iowa, 417; *Jenkins v. Sugar Co.*, (1916) 237 Fed. 278, 30 *Harvard Law Review*, 517. And see as presenting difficult questions of construction, *Crane v. Crane*, (1901) 105 Fed. 869; *Davie v. Mining Co.*, (1892) 93 Mich. 491; *Dailey Co. v. Can Co.*, (1901) 128 Mich. 591; *McKeever v. Cannonsburg Iron Co.*, (1888) 138 Pa. 184. Where the words used by the parties are at all doubtful, the courts generally lean toward that construction that carries out the apparent intention of the parties to make a valid bilateral contract. For many modern cases to

general rule as to the revocability of an offer must be made in the case of an offer under seal. It is said that this cannot be revoked:¹ even though it is not communicated to the offeree it remains open for his acceptance when he becomes aware of its existence.

There is no doubt that a grant under seal is binding on the grantor and those who claim under him, though it has never been communicated to the grantee, if the deed has been duly delivered;^{a 2} and it would seem that an obligation created by deed is on the same footing. The promisor is bound,² but the promisee need not take advantage of the promise unless he choose: he may repudiate it, and it then lapses.

"If A make an obligation to B and deliver it to C, this is the deed of A presently. But if C offers it to B, then B may refuse it *in pais*, and thereby the obligation will lose its force."^b

The situation in such a case is anomalous. It is in fact irreconcilable with the modern analysis of contract as meaning an expression by at least two persons of a common intention whereby expectations are created in the mind of one or both.

A promise under seal is *factum*, a thing done beyond recall; and the promisor is in the position of one who has made an offer which he cannot withdraw, or a conditional promise depending for its operation on the assent of the promisee.³

^a *Doe d. Garbons v. Knight*, (1826) 5 B. & C. 71. "Delivery" of a deed does not necessarily involve the handing of it over to the other party to the contract.

^b *Butler & Baker's case*, (1591) Coke, Rep. iii. 26. b.

this effect, and also for cases *contra*, see extended notes in 11 L.R.A. (N.S.) 713; 43 L.R.A. (N.S.) 730.

It would seem that *Cooper v. Lansing Wheel Co.*, *supra*, should fall in the second class, although the court says the offeror might have withdrawn the offer. The doctrine there advanced that in a case of the first class an order once given furnishes a consideration for the promise to leave the offer open thereafter, is apparently not repeated elsewhere. Such a contract is valid if made, the only question being one of fact, whether or not the offeror made such a promise for the consideration of the first order. See *Michigan Bolt Works v. Steel*, (1896) 111 Mich. 153; *Hickey v. O'Brien*, *supra*.

A mere invitation to make an offer or enter into negotiations must be distinguished. *Moulton v. Kershaw*, (1884) 59 Wis. 316.

¹ *McMillan v. Ames*, (1885) 33 Minn. 257.

² But in many American states it is held that a deed does not become valid and bind the grantor until it has been accepted by the grantee, or by some one acting for him whose act is either authorized or ratified. *Meigs v. Dexter*, (1898) 172 Mass. 217; *Derry Bank v. Webster*, (1862) 44 N.H. 264; *Welch v. Sackett*, (1860) 12 Wis. 243.

³ *Irrevocable offers*. It has been sometimes asserted that an irrevocable offer is "a legal impossibility." See Langdell, Summary of the Law of

51. Revocation must be communicated. It remains to state that revocation, as distinct from lapse, if it is to be operative, must be communicated. In the case of acceptance we have seen that it is communicated, and the contract made, if the offeree does by way of acceptance that which the offeror has directly or indirectly indicated as sufficient. The posting of a letter, the doing of an act, may constitute an acceptance and

Contracts, § 178, also § 4; Wormser, "The True Conception of Unilateral Contracts," 26 *Yale Law Journal*, 137, note; Lee, title Contracts, in Jenks' Dig. of Eng. Civ. Law, § 195; Ashley, Contracts, § 13. A close analysis shows that there is nothing impossible either in the conception itself or in its application. If we define "offer" as an act on the part of the offeror (see § 37a), then no offer can ever be revoked, for it is of yesterday — it is indeed *factum*. But if we mean by "offer" the legal relation that results from the offeror's act, the power then given to the offeree of creating contractual relations by doing certain voluntary acts on his part, then the offer may be either revocable or irrevocable according to the circumstances. The idea of an irrevocable power is not at all an unfamiliar one.

The courts have held that most offers can be revoked only by giving actual notice to the offeree. If the giving of this notice is not possible, then the offer is irrevocable from a practical standpoint. The offeror may have the legal power to revoke, but not the physical ability to exercise it.

Secondly, the offeror may have made an offer and have promised, for a consideration or under seal, not to withdraw it. In such cases the offeree has what is called a binding option. In these cases the offeror is not privileged to withdraw his offer, and an action for damages lies against him in any case where he repudiates his promise. *Manary v. Runyon*, (1903) 43 Ore. 495; *Black v. Maddox*, (1898) 104 Ga. 157; *Dambmann v. Rittler*, (1889) 70 Md. 380.

In many of these cases the offeror is not only not legally privileged to withdraw his offer, but it is beyond his power, and the offeree's power to conclude the contract may be said to be truly irrevocable. In some of the following cases equity decreed specific enforcement in spite of an attempted revocation. *O'Brien v. Boland*, (1896) 166 Mass. 481; *Watkins v. Robertson*, (1906) 105 Va. 269; *McMillan v. Ames*, (1885) 33 Minn. 257; *Hayes v. O'Brien*, (1894) 149 Ill. 403; *Paddock v. Davenport*, (1890) 107 N.C. 710; *Hurford v. Pile*, (1615) Cro. Jac. 483.

It is sometimes provided by statute that offers shall be irrevocable under certain circumstances. See Swiss Code of Oblig. § 3; German Civil Code, §§ 145, 658; Jap. Civ. Code, art. 521; Civil Code Ga. § 3645.

The following cases hold that an offer becomes irrevocable after the offeree has taken substantial steps in the process of acceptance but has not yet completed the acceptance: *Louisville & N.R. Co. v. Goodnight*, (1874) 10 Bush (Ky.) 552; *Los Angeles Traction Co. v. Wilshire*, (1902) 135 Cal. 654; *Zwolanek v. Baker Mfg. Co.*, (1912) 150 Wis. 517; *Louisville and N.R. Co. v. Coyle*, (1906) 123 Ky. 854; *Braniff v. Blair*, (1917, Kan.) 165 Pac. 816. See also the charitable subscription cases, § 142, *post*. *Contra*: *Biggers v. Owen*, (1887) 79 Ga. 658; *Gray v. Hinton*, (1881) 7 Fed. 81; *Stensgaard v. Smith*, (1890) 43 Minn. 11.

For a full discussion, see Corbin, "Offer and Acceptance and Some of the Resulting Legal Relations," (1917) 26 *Yale Law Journal*, 169, 185-197; McGovney, "Irrevocable Offers," 27 *Harvard Law Review*, 644.

make a contract. The question at once arises, Can revocation be communicated in the same way, by the posting of a letter of revocation, by the sale of an article offered for purchase?

The answer must be (subject to the consideration of two cases to which I will presently advert), that revocation of an offer is not communicated *unless brought to the knowledge* of the offeree. The rule of law on this subject was settled in *Byrne v. Van Tienhoven*.^a The defendant, writing from Cardiff on October 1st, made an offer to the plaintiff in New York asking for a reply by cable. The plaintiff received the offer on the 11th, and at once accepted in the manner requested. On the 8th the defendant had posted a letter revoking his offer.

The questions which Lindley, J., considered to be raised were two. (1) Has a revocation any effect until communicated? (2) Does the posting of a letter of revocation amount to a communication to the person to whom the letter is sent?

He held (1) that a revocation was inoperative until communicated,¹ (2) that the withdrawal of an offer was not communicated by the mere posting of a letter; and that therefore an acceptance made by post is not affected by the fact that a letter of revocation is on its way.² He points out the inconvenience which would result from any other conclusion.

"If the defendant's contention were to prevail no person who had received an offer by post and had accepted it, would know his position until he had waited such time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance if it. It appears to me that both legal principle and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties."³

The case of *Henthorn v. Fraser*,^b decided in the Court of Appeal, extends this rule to the case of a written offer de-

^a (1880) 5 C.P.D. 344.

^b [1892] 2 Ch. 27, C.A.

¹ *Tayloe v. Merchants' Fire Ins. Co.*, (1850, U.S.) 9 How. 390; *Patrick v. Bowman*, (1893) 149 U.S. 411; *The Palo Alto*, (U.S. C.C.) 2 Ware, 344.

² *Brauer v. Shaw*, (1897) 168 Mass. 198; *Wheat v. Cross*, (1869) 31 Md. 99. *Stevenson v. McLean*, (1880) 5 Q.B.D. 346.

³ There is American authority for the view that the revocation of an offer made by advertisement need not be communicated to the offeree. As such an offer is made to the whole world, it clearly can be revoked only in the way in which it is made — by advertisement. See *Shuey v. United States*, (1875) 92 U.S. 73; *Sears v. Eastern R. Co.*, (1867) 14 Allen (Mass.) 433. The same rule is adopted in the German Civil Code, § 658, and in the Jap. Civil Code, art. 530.

livered by hand and accepted by post. Lord Herschell there says:

"The grounds on which it has been held that the acceptance of an offer is complete when it is posted, have I think no application to the revocation or modification of an offer. These can be no more effectual than the offer itself unless brought to the mind of the person to whom the offer is made."

The same principle is illustrated by *Curtice v. City of London and Midland Bank*.^a Payment of a check was countermanded by a telegram, which, by the negligence of the bank's servants, was not brought to the notice of the manager until after the check was paid; it was held that the telegram was inoperative to countermand payment.¹

52. Promise to leave offer open. *Cook v. Oxley*. There are two cases which have been thought to suggest that when the offer is an offer to sell property it may be revoked merely by the sale of the property to a third person, and without communication to the offeree. This view may be dismissed, but the cases raise other points of interest.

In *Cook v. Oxley*^b the defendant offered to sell specific goods to the plaintiff on certain terms and to keep the offer open until 4 o'clock that day. Cook averred that he did agree within the time allowed, but that Oxley failed to deliver. The Court held that a promise to keep the offer open till 4 o'clock was not binding for want of consideration, and that —

"The promise can only be supported on the ground of a new contract made at 4 o'clock; but there is no pretense for that. It has been argued that this must be taken to be a complete sale from the time the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at 4 o'clock to the terms of the sale, or even that the goods were kept till that time."

These last words suggest that, in the view of the court, Oxley was not only free to revoke his offer at any time before acceptance, but free to revoke it by a mere sale of the goods without notice.²

^a [1908] 1 K.B. 293 (C.A.).

^b (1790) 3 T.R. 653.

¹ This case is in point because, although the check is not an offer, it does create a power; and the question is as to how such a power can be terminated.

² This use of the word "free" is open to objection, although it is not uncommon. There is no doubt that Oxley was "free" or *privileged* to revoke, — that is, he was under no duty not to revoke. Beyond question, also, he had the legal *power* to revoke. It is now well settled, however, that this power can be exercised only by actual notice to Cook.

But if the report of this case is carefully examined it will be seen that while the pleader stated a good cause of action, the arguments of counsel for the plaintiff took a different and an untenable ground. The plaintiff's declaration sets forth clearly enough an offer turned into a contract by acceptance at 4 P.M. But the argument addressed to the court set up a conditional sale of the property if Cook chose to declare himself a buyer before 4 o'clock: so that Oxley was bound to sell if required, but Cook was not bound to buy. The court held that the alleged promise to keep the goods till 4 P.M. was *nudum pactum*, and the case is merely authority for saying that such a promise is not binding without consideration. The question of the sufficiency of the revocation was never raised.¹

53. *Revocation communicated by stranger.* The other case is *Dickinson v. Dodds*,^a a suit for specific performance of a contract under the following circumstances. On the 10th of June, 1874, Dodds gave to Dickinson a memorandum in writing as follows:

"I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling and out-buildings thereto belonging situated at Croft, belonging to me, for the sum of £800. As witness my hand this 10th day of June, 1874.

"£800 (Signed) John Dodds."

"P.S. This offer to be left over until Friday, 9 o'clock A.M. J. D. (the twelfth) 12th June, 1874.

"(Signed) J. Dodds."

On the 11th of June he sold the property to another person without notice to Dickinson. As a matter of fact Dickinson was informed of the sale, though not by any one acting under the authority of Dodds. He gave notice, after the sale but before 9 o'clock on the 12th, that he accepted the offer to sell, and sued for specific performance of what he alleged to be a contract.

The Court of Appeal held that there was no contract. James,

^a (1876) 2 Ch. D. 463.

¹ "That case [Cook v. Oxley] has been supposed to be inaccurately reported; and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority." Fletcher, J., in *Boston &c. R. v. Bartlett*, (1849, Mass.) 3 Cush. 224, 228. See also *Nyulasy v. Rowan*, (1891) 17 Vict. L.R. 663.

L.J., after stating that the promise to keep the offer open could not be binding, and that at any moment before a complete acceptance of the offer one party was as free as the other, goes on to say:

"It is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'now I withdraw my offer.' *I apprehend that there is neither principle nor authority for the proposition that there must be an actual and express withdrawal of the offer, or what is called a retraction.* It must to constitute a contract appear that the two minds were one at the same moment of time, that is, that there was an offer continuing up to the moment of acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer.'"

If and so far as the above language was intended to suggest that a revocation in fact of an offer without the knowledge of the offeree would avail against an acceptance by the offeree within the prescribed time, it must no doubt be regarded as overruled by subsequent decisions. But the language of the learned judges in *Dickinson v. Dodds* may well be open to the construction that they treated the question as to the offeree's knowledge of the revocation as wholly one of fact and were satisfied in the case before them that he knew well enough, when he accepted, that the offer had already been withdrawn.

But can we hold that knowledge of the offeror's intention to revoke, from whatever source it reaches the offeree, is good notice of revocation? If this is correct the inconvenience might be grave. Suppose a merchant to receive an offer of a consignment of goods from a distant correspondent, with liberty to reserve his answer for some days. Meantime an unauthorized person tells him that the offeror has sold or promised the goods to another. What is he to do? His informant may be right, and then, if he accepts, his acceptance would be worthless. Or his informant may be a gossip or mischief-maker, and if on such authority he refrains from accepting he may lose a good bargain.

Such is the real and only difficulty created by *Dickinson v. Dodds*. The case is no authority for the validity of an uncommunicated revocation: but it does raise a question as to the effect of an unauthorized notice of revocation upon the rights

of the offeree. The answer appears to be that it is open to an offeror, who has revoked an offer without direct communication to the offeree, to show that the offeree knew, from a trustworthy source, that the offer was withdrawn. The Court would thus decide every such case on the facts presented; and that this is the true explanation of *Dickinson v. Dodds* is borne out by the later decision in *Cartwright v. Hoogstoel*,^a where the facts were almost exactly similar, and which seems to be the only other case in which this point has come up for consideration.¹

We now come to two sets of rules relating to the serious and definite character with which offer and acceptance must be invested if they are to create legal relations.

7. *The offer must be intended to create, and capable of creating, legal relations.*

54. **No intent to create legal relations.** In order that an offer may be made binding by acceptance, it must be made in contemplation of legal consequences; a mere statement of intention made in the course of conversation will not constitute a binding promise, though acted upon by the party to whom it was made.² In an old case, the defendant said, in conversation with the plaintiff, that he would give £100 to him who married his daughter with his consent. Plaintiff married defendant's daughter with his consent, and afterwards brought an action on the alleged promise. It was held that it is not reason that the defendant "should be bound by general words spoken to excite suitors."^b

A stronger illustration is supplied by a recent case.^c A father writing to the plaintiff who was about to marry his daughter used these words: "She will have a share of what I leave after the death of her mother." This was held by Cozens-Hardy, J., not to be an offer capable of being turned into a promise on marriage taking place, but a mere statement of an intention by the father to give the daughter something at his death.^d

^a (1911) 105 L.T. 628.

^b *Weeks v. Tybald*, (1805) Noy, 11.

^c *Farina v. Fickus*, [1900] 1 Ch. 331.

^d The learned judge held that if there was a contract it was satisfied by a legacy left to the daughter, which only represented a small share of the father's estate. The student may compare with advantage this case and that of *Laver v. Fielder*, (1862) 32 Beav. 1, where words addressed to a suitor were held to constitute a promise to leave such a share as the daughter would have been entitled to on intestacy.

¹ In accord, see *Coleman v. Applegarth*, (1887) 68 Md. 21; *Frank v. Stratford-Handcock*, (1904) 13 Wyo. 37, 67 L.R.A. 571.

² A statement of intention of this sort is not a promise. Nor is it an "offer," for the reason that it creates no legal power in the other party.

On a like footing stand engagements of pleasure, or agreements which from their nature do not admit of being regarded as business transactions. We cannot in all cases decline to regard such engagements as contracts on the ground that they are not reducible to a money value. The acceptance of an invitation to dinner or to play in a cricket match forms an agreement in which the parties may incur expense in the fulfillment of their mutual promises. The damages resulting from breach might be ascertainable, but the courts would probably hold that, as no legal consequences were contemplated by the parties, no action would lie.¹

55. Vague or ambiguous terms. And an offer must be capable of affecting legal relations. The parties must make their own contract: the courts will not construct one for them out of terms which are indefinite or illusory. *A* bought a horse from *X* and promised that "if the horse was lucky to him he would give £5 more or the buying of another horse": it was held that such a promise was too loose and vague to be considered in a court of law.²

A covenanted with *X* to retire wholly from the practice of a trade "so far as the law allows": it was held that the

¹ *Guthing v. Lynn*, (1831) 2 B. & Ad. 232.

² Words spoken in jest or banter do not constitute a contract. *Keller v. Holderman*, (1863) 11 Mich. 248; *McClurg v. Terry*, (1870) 21 N.J. Eq. 225; *Theiss v. Weiss*, (1895) 166 Pa. 9; *Bruce v. Bishop*, (1870) 43 Vt. 161; *Paulus*, Digest XLIV, 7, 3, § 2; German Civ. Code, § 118. Words spoken in anger or excitement may not constitute a contract. *Higgins v. Lessig*, (1893) 49 Ill. App. 459. But in either case the offeree must understand that there is no real intent to create legal relations. *Plate v. Durst*, (1896) 42 W.Va. 63; *McKinsie v. Stretch*, (1893) 53 Ill. App. 184.

³ *Burks v. Stam*, (1896) 65 Mo. App. 455; *Clark v. Pearson*, (1893) 53 Ill. App. 310; *Wall's Appeal*, (1886) 111 Pa. 460 (promise to provide for another by will too indefinite); *Adams v. Adams*, (1855) 26 Ala. 272; ("full share" indefinite, "equal share" definite); *Fairplay School Tp. v. O'Neal*, (1890) 127 Ind. 95 (promise to pay good wages too indefinite). But see *Henderson Bridge Co. v. McGrath*, (1889) 134 U.S. 260 (promise to "do what is right" may be a promise to pay reasonable compensation); *Chichester v. Vass*, (1810, Va.) 1 Munf. 98 (promise to do equal justice among children); *Thompson v. Stevens*, (1872) 71 Pa. 161 (promise to give enough so promisee need not work).

It should be observed here that where the words and other acts of the parties are so indefinite as to express nothing they are utterly inoperative to create legal relations. But if a performance follows by which one of the parties receives value from the other, such performance is very generally held to operate to create a legal duty of reimbursement to the extent of the value received. This duty is a construction of law and is not the one intended by either party. It is generally described as *quasi-contractual*.

parties must fix the limit of their covenant and not leave their agreement to be framed for them by the court.^a

A made a contract with X and promised that if "satisfied with you as a customer" he "would favorably consider" an application for a renewal of the contract: it was held that there was nothing in these words to create a legal obligation.^{b 1}

A communicated with X by telegraphic code, and owing to a mistaken economy of words the parties differed in the construction of the contract. Here the party relying on the contract must fail, for the court will not determine a question which the parties should not have left in doubt.^{c 2}

8. Acceptance must be absolute, and must correspond with the terms of the offer

§6. Inconclusive forms of acceptance. If a contract is to be made, the intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance, or as to the correspondence of the terms of the acceptance with those of the offer.

The forms of difficulty which arise in determining whether or no an acceptance is conclusive, may be said to be three. The alleged acceptance (1) may be a refusal and counter-offer, or a mere statement of fact relating to the proposed transaction: (2) may be an acceptance with some addition or variation of terms: (3) may be an acceptance of a general character, to be limited and defined by subsequent arrangement of terms.

^a *Davies v. Davies*, (1886) 36 Ch. D. 359.

^b *Montreal Gas Company v. Vasey*, [1900] A.C. 595.

^c *Falck v. Williams*, [1900] A.C. 176; *Miles v. Haselhurst*, (1906) 12 Com. Cas. 8.

¹ But see *Worthington v. Beeman*, (1899) 91 Fed. 232.

² In the following cases the court held the promise too vague to be enforced: *Sherman v. Kitsmiller*, (1827, Pa.) 17 S. & R. 45; *Hart v. Georgia R. Co.*, (1897) 101 Ga. 188; *Marble v. Standard Oil Co.*, (1897) 169 Mass. 553; *Young v. Farwell*, (1893) 146 Ill. 466; *Howlett v. Howlett*, (1897) 115 Mich. 75; *Hauser v. Harding*, (1900) 126 N.C. 295.

United Press v. New York Press Co., (1900) 164 N.Y. 406, held the contract to pay not exceeding three hundred dollars a week for news too indefinite to warrant substantial damages for refusal to receive the news, but awarded nominal damages for a technical breach. If under such a contract the service is rendered and accepted the recovery is in *quantum meruit*. *Kennedy v. McKone*, (1896) 10 N.Y. App. Div. 88. In *Silver v. Graves*, (1911) 210 Mass. 26, a recovery was allowed upon a contract to "make it right" for withdrawing from a will contest. The true basis of recovery would seem to be quasi-contract. In *Varney v. Ditmars*, (1916) 217 N.Y. 223, a promise to pay "a fair share of profits" was held too vague for enforcement.

57. Refusal and counter-offer. In the case of *Hyde v. Wrench*,^a A offered to sell a farm to X for £1,000. X said he would give £950. A refused, and X then said he would give £1,000, and, when A declined to adhere to his original offer, tried to obtain specific performance of the alleged contract. The court, however, held that an offer to buy at £950 in response to an offer to sell for £1,000 was a refusal and a counter-offer.¹

An offer once refused is dead and cannot be accepted unless renewed;² but an inquiry as to whether the offeror will modify his terms does not necessarily amount to a refusal.³

58. Mere statement of price. The case of *Harvey v. Facey*,^c decided by the Judicial Committee, was not one of counter-offer, but of a statement as to price which the intending acceptor chose to treat as an offer. X telegraphed to A, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid." A replied by telegram, "Lowest price for Bumper Hall Pen £900." X telegraphed, "We agree to buy Bumper Hall Pen for £900 asked by you."

On this correspondence X alleged that a contract had been made for the sale of Bumper Hall Pen at the price stated by A to be the lowest that he would take. It was held that no contract had been made, that A in stating the lowest price which he would take was not accepting an offer but supplying information, that the third of the telegrams set out above was an offer by X — not the less so because he called it an acceptance — and that this offer had never been accepted by A.³

59. New terms in acceptance. The acceptance of an offer may introduce terms not comprised in the offer, and in such cases no contract is made, for the offeree in effect refuses the offer and makes a counter-offer of his own.

In the case of *Jones v. Daniel*,^d A offered £1,450 for a prop-

^a (1840) 3 Beav. 334.

^b *Stevenson v. McLean*, (1890) 5 Q.B.D. 346.

^c [1893] A.C. 552.

^d [1894] 2 Ch. 332.

¹ *Minneapolis & St. Louis Ry. v. Columbus Rolling Mill*, (1886) 119 U.S. 149; *Egger v. Nesbitt*, (1894) 122 Mo. 667; *Russell v. Falls Mfg. Co.*, (1900) 106 Wis. 329; *Johnson v. Fed. U. Sur. Co.*, (1915) 187 Mich. 454.

² *Tinn v. Hoffman*, (1873) 29 L.T. (N.S.) 271.

³ *Montgomery Ward & Co. v. Johnson*, (1911) 209 Mass. 89 (circular and price list held a mere invitation to submit offers); *Moulton v. Kershaw*, (1884) 59 Wis. 316; *Schenectady Stove Co. v. Holbrook*, (1885) 101 N.Y. 45; *Knight v. Cooley*, (1872) 34 Iowa, 218; *Ahearn v. Ayres*, (1878) 38 Mich. 692; *Beaupré v. Pacific &c. Co.*, (1874) 21 Minn. 155; *Talbot v. Pettigrew*, (1882) 3 Dak. 141.

The principle is clear, but the correctness of its application in *Harvey v. Facey*, *supra*, may well be doubted.

erty belonging to *X*. In accepting the offer *X* enclosed with the letter of acceptance a contract for signature by *A*. This document contained various terms as to payment of deposit, date of completion, and requirement of title which had never been suggested in the offer. The court held that there was no contract; that it would be equally unfair to hold *A* to the terms of acceptance, and *X* to those of the offer.

The case of *Canning v. Farquhar*^a is decided substantially, though not so obviously, on the same ground. A proposal for life insurance was made by Canning to the defendant company, and was accepted at a premium fixed in their answers subject to a proviso that "no assurance can take place until the first premium is paid." Before the premium was paid and the policy prepared Canning suffered a serious injury, and the company consequently refused to accept a tender of the premium and to issue the policy.

It was held that the company's acceptance of the proposal was really a counter-offer, and that the change in the risk which occurred between this counter-offer and the acceptance which was made by tender of the premium entitled the company to refuse to issue the policy.¹

60. Reference to existing terms. In cases where offer or acceptance is couched in general terms, but refers to a contract in which the intention of the parties may be more precisely stated, it is important to note whether the terms of such a contract were in existence, and known to the parties, or whether they were merely in contemplation. In the former case the offer and acceptance are made subject to, and inclusive of, the fuller conditions and terms: in the latter case the acceptance is too general to constitute a contract.

^a (1886) 16 Q.B.D. 727.

¹ *Seymour v. Armstrong*, (1901) 62 Kans. 720 (acceptance of offer with new term as to price of packing cases); *Jacob Johnson Fish Co. v. Hawley*, (1912) 150 Wis. 578; *Kingsway C. Co. v. Metrop. L.I. Co.* (1915, N.Y.) 166 App. D. 384. See *Minneapolis & St. Louis Ry. v. Columbia Rolling Mill*, *supra*. Words indicating acceptor's construction of terms of offer do not introduce a new term, if such construction is the reasonable one or if his acceptance is clearly not conditional upon such construction. *Kennedy v. Gramling*, (1890) 33 S.C. 367. An acceptance is not made conditional by words conveying merely a request. *Culton v. Gilchrist*, (1894) 92 Iowa, 718. The words "All sales subject to strikes and accidents" printed on a letter head are not a part of an absolute acceptance written below. *Summers v. Hibbard*, (1894) 153 Ill. 102; *Poel v. Brunswick & Co.*, (1915) 216 N.Y. 310.

A verbal offer was made to purchase land, the offeror was told that the land must be purchased under certain printed conditions, and the offer, which was still continued, was accepted "subject to the conditions and particulars printed on the plan." As these were contemplated in the offer a complete contract was thus constituted.^a

An offer was made to buy land, and "if offer accepted, to pay deposit and sign contract on the caution particulars"; this was accepted, "subject to contract as agreed." The acceptance clearly embodied the terms of the contract mentioned in the offer, and constituted a complete contract.^b

61. Reference to future terms. On the other hand, where an offer to sell property was accepted "subject to the terms of a contract being arranged" between the solicitors of the parties, no contract was made. The acceptance was not, in fact, more than an expression of willingness to treat.^{c 1}

"It comes therefore to this, that where you have a proposal or agreement made in writing expressed to be subject to a contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail."^d

62. Questions of construction. There are cases which at first sight may appear to be cases of doubt or difference in the acceptance of an offer, but really turn out to involve only questions of the admissibility of evidence or the interpretation of terms.

^a *Rossiter v. Miller*, (1878) 3 App. Cas. 1124. ^b *Filby v. Hounsell*, [1896] 2 Ch. 787.
^c *Honeyman v. Marryatt*, (1855) 6 H.L.C. 113. ^d *Winn v. Bull*, (1877) 7 Ch. D. 29, 32.

¹ *Mississippi &c. Co. v. Swift*, (1894) 86 Me. 248; *Sibley v. Felton*, (1892) 156 Mass. 273; *Brown v. New York Central R.*, (1870) 44 N.Y. 79; *Donnelly v. Currie Hardware Co.*, (1901) 66 N.J. 388; *Shepard v. Carpenter*, (1893) 54 Minn. 153. The following cases held the contract not yet made, because the parties contemplated the execution of a formal document as the vital expression of agreement: *Stanton v. Dennis*, (1911) 64 Wash. 85; *Spinney v. Downing*, (1895) 108 Cal. 666; *Alexandria B. Co. v. Miloslawsky*, (1915, Ia.) 149 N.W. 504. But if a complete contract has been agreed upon it is binding, although it is also agreed that it shall subsequently be reduced to writing. *Sanders v. Pottlitzer &c. Co.*, (1894) 144 N.Y. 209; *Allen v. Chouteau*, (1890) 102 Mo. 309; *Cohn v. Plumer*, (1894) 88 Wis. 622; *U.S. v. Carlin Const. Co.*, (1915, C.C.A.) 224 Fed. 859; *McConnell v. Harrell*, (1914) 183 Mich. 369; *Conner v. Plank*, (1915) 25 Cal. App. 516; *So. Ry. Co. v. Huntsville L. Co.*, (1915, Ala.) 67 So. 695; *Alexander-Amberg & Co. v. Hollis*, (1915, Ark.) 171 S.W. 915. See further 15 *Columbia Law Review*, 700; 8 *Harvard Law Review*, 498; 29 L.R.A. 431.

Such are cases in which the parties have made a written agreement, dependent for its coming into effect on a verbal condition or stipulation. *Pym v. Campbell*,^a and *Pattle v. Hornibrook*^b are instances of contracts, apparently complete, held in abeyance until a verbal condition is fulfilled; and this verbal condition is admitted in evidence as forming part of the written contract.¹

Such, too, are cases in which a contract has to be made out of a correspondence involving lengthy negotiations. The parties discuss terms, approach and recede from an agreement; offers are made and met by the suggestion of fresh terms; finally there is a difference; and one of the parties asserts that a contract has been made, and the other that matters have never gone beyond a discussion of terms.

Where such a correspondence appears to result, at any moment of its course, in a definite offer and acceptance, it is necessary to ask whether this offer and acceptance include all the terms under discussion. For where the parties have come to terms a subsequent revival of negotiations may amount to a repudiation on one side, and consequent breach, but does not alter the fact that a contract has been made.^c

In the case of an alternative offer by letter to let the whole of an estate, called Minydon, or to sell a portion, the terms of each offer being stated, an acceptance couched in the terms, "I accept your offer of Minydon on the terms named therein," was held to be an acceptance of the offer to let, the two letters making a completed contract.^d

But these cases turn rather on the meaning to be given to the words of the parties, than on rules of law.²

9. *An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person*

63. Offer to all the world. The proposition is best understood by an illustration.

The offer, by way of advertisement, of a reward for the

^a (1856) 6 E. & B. 370.

^b [1897] 1 Ch. 25.

^c *Hussey v. Horne Payne*, (1878) 4 App. Cas. 311; *Bellamy v. Debenham*, (1891) 45 Ch. D. 481; *Perry v. Sutcliffe*, [1916] 2 Ch. 187, 191.

^d *Lever v. Koffler*, [1901] 1 Ch. 543.

¹ *Reynolds v. Robinson*, (1888) 110 N.Y. 654; *Blewitt v. Boorum*, (1894) 142 N.Y. 357; *Westman v. Krumweide*, (1883) 30 Minn. 313.

² See *Sanders v. Pottlitzer & Co.*, (1894) 144 N.Y. 209; *Jordan v. Walker*, (1908) 154 Mich. 394; *Bollenbacher v. Reid*, (1908) 155 Mich. 277; *Weishut v. Layton*, (1915, Del.) 93 Atl. 1057.

rendering of certain services, addressed to the public at large, becomes a contract to pay the reward so soon as an individual renders the services, but not before.

To hold that any contractual obligation exists before the services are rendered, would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or, as it has been expressed, that a man may have a contract with the whole world. This view has never been seriously entertained in English law;^a the promise is regarded as being made, not to the many who *might* accept the offer, but the person or persons by whom it is accepted.¹

The contract may assume a form not so simple. Where competitors are invited to enter for a race, subject to certain conditions, by a committee or other agency, each competitor who enters his name thereby offers, to such other persons as may also compete, an undertaking to abide by the conditions under which the race is run. The offer is made through an agent or a committee to uncertain persons who define themselves by entry under conditions which are binding on all. Such was the contract made in the case of the *Satanita*,^b *Clarke v. Dunraven*: and such is the case of a lottery where each one of a number of persons unknown to one another places money in the hands of a stakeholder on the terms that the whole sum should be paid to one of them on a given conclusion of an event uncertain at the time.^c

64. Problems and difficulties. Such offers suggest more practical difficulties.

1. *Who is entitled as acceptor?* The offer may be susceptible of acceptance by a number of persons.

When it is a conditional offer of reward to any person who

^a The view of Savigny (Obl. 2, § 61) that an obligation arises at once from an offer of this sort, but that performance of the condition can only create a debt of honor, seems to the English lawyer neither logical nor equitable. By "obligation" an English lawyer means a legal obligation, an obligation that the law will enforce.

^b [1895] P. 255; [1897] A.C. 59.

^c *Barclay v. Pearson*, [1893] 2 Ch. 154.

¹ But even before the conclusion of the contract with a definite person, the power to accept might be held to be irrevocable. See § 51, *ante*.

² Competition for prizes. *Porter v. Day*, (1888) 71 Wis. 296; *Harris v. White*, (1880) 81 N.Y. 532; *Alvord v. Smith*, (1878) 63 Ind. 58; *Delier v. Plymouth &c. Soc.*, (1881) 57 Iowa, 481; *Wilkinson v. Stitt*, (1900) 175 Mass. 581. And see *Vigo Agr. Soc. v. Brumfiel*, (1885) 102 Ind. 146. To the present editor the case of the *Satanita* has seemed to be a decision based upon fiction, the only contract contemplated *in fact* being one made by each person entering the race with the club or committee, of which contract the other parties involved are mere beneficiaries. This appears to be the view of Professor Holland also, *Juris.*, (10th ed.) p. 250.

does a specified act, the number of persons who may do the act and satisfy the condition does not appear to affect the validity of the offer.^a

But where there is an offer of reward for the supply of a specified piece of information, the offeror clearly does not mean to pay many times over for the same thing. So where information has been collected and contributed by various persons the question arises, Which of these has accepted the offer?

In *Lancaster v. Walsh*^b it was held that he who gave the earliest information was entitled to the reward.¹

2. *What constitutes acceptance?* Where a constable has given information for which reward has been offered, it may be asked whether he has done more than in the ordinary course of duty he is bound to do. It would seem from the case of *England v. Davidson*,^c where a policeman not only gave information but collected evidence, and was thereupon held entitled to the reward, that unless a police constable does something more than the ordinary course of duty would require, he cannot claim a reward.²

But there are more serious difficulties.

3. *Is knowledge of the offer essential?* Is knowledge of the existence of an offer essential to its acceptance, or can it be accepted by an accidental compliance with its terms?

Williams v. Carwardine^d is authority for saying that the *motive of compliance* is immaterial; it does not seem to be authority for saying that knowledge of the offer is immaterial.

In *Fitch v. Snedaker*^e it is laid down with clear and convincing argument that knowledge of the offer is essential, but this conclusion is not uniformly accepted in the state courts of America.³

^a *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 288.

^b (1838) 4 M. & W. 16.

^c (1840) 11 A. & E. 856.

^d (1833) 4 B. & Ad. 621.

^e (1868) 38 N.Y. 248.

¹ *United States v. Simons*, (1881) 7 Fed. 709. For cases of joint informers see *Janvrin v. Exeter*, (1868) 48 N.H. 83; *Fargo v. Arthur*, (1872, N.Y.) 43 How. Pr. 193. Courts of equity have sometimes divided the offered reward among several, each of whom gave a part of the desired information. There is no objection to this where the offeror admits his liability and pays the money into court. See *Rochelle v. Pac. Ex. Co.*, (1909, Tex.) 120 S.W. 543; *Bloomfield v. Maloney*, (1913) 176 Mich. 548.

² *Smith v. Whildin*, (1848) 10 Pa. 39; *Ring v. Devlin*, (1887) 68 Wis. 384. But if the act is extra-official the reward may be recovered. *McCandless v. Allegheny Bessemer Steel Co.*, (1893) 152 Pa. 139; *Harris v. More*, (1896) 70 Cal. 502.

³ *Fitch v. Snedaker*, (1868) 38 N.Y. 248. See § 29, *ante* *Dawkins v. Sappington*, (1866) 26 Ind. 199, is *contra*.

Gibbons v. Proctor^a is the only English case which appears to lay down a rule that knowledge of the offer is immaterial. The decision comes to this, that if the offeror gets what he wants he must pay for it, even though the information wanted was supplied in ignorance that a reward was offered, was supplied before the reward was offered, and was supplied by a constable in the ordinary course of his duty. It is impossible to accept this case as an authority.

4. *Distinction between offer and invitation to treat.* It is often difficult to distinguish statements of intention which can result in no obligation *ex contractu* from offers which admit of acceptance, and so become binding promises. Such statements may relate to the whole transaction or only to a subordinate part of the transaction. A man announces that he will sell goods by tender or by auction, or that he is prepared to pay money under certain conditions: or again, a railway company offers to carry passengers from A to X and to reach X and the intermediate stations at certain times. In such cases it may be asked whether the statement made is an offer capable of acceptance or merely an invitation to make offers and do business; whether the railway company by its published time-table makes offers which become terms in the contract to carry, or whether it states probabilities in order to induce passengers to take tickets.

(a) We may note the distinction in the following cases.

An invitation to compete for a scholarship does not import a promise that the scholarship will be given to the candidate who obtains the highest marks if examiners report that he is not of sufficient merit to receive the scholarship.^b

An announcement that goods would be sold by tender, unaccompanied by words indicating that they would be sold to the highest bidder, was held to be "a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt."^c 1

^a (1891) 64 L.T. 594.

^b *Rooke v. Dawson*, [1895] 1 Ch. 480.

^c *Spencer v. Harding*, (1870) L.R. 5 C.P. 561.

¹ An invitation for bids for construction, etc., is not an offer to award to the lowest bidder. *Leaskie v. Haseltine*, (1893) 155 Pa. 98; *Smith v. Mayor*, (1853) 10 N.Y. 504; *Kelly v. Chicago*, (1871) 62 Ill. 279. The bid is an offer. Even a vote of a committee to accept it is not effective unless officially communicated. *Benton v. Springfield, &c. Ass'n*, (1898) 170 Mass. 534; *Edge Moor Bridge Works v. County of Bristol*, (1898) 170 Mass. 528; *Peek v. Detroit Novelty Works*, (1874) 29 Mich. 313.

An advertisement by an auctioneer, that a sale of certain articles would take place on a certain day, was held not to bind the auctioneer to sell the goods, nor to make him liable upon a contract to indemnify persons who were put to expense in order to attend the sale.

"Unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, we cannot hold the defendant liable." ^{a 1}

(b) On the other hand we find in the following cases a contract made by acceptance of a general offer, such acceptance being signified by performance of its terms.

In *Warlow v. Harrison* ^b the putting up of property by an auctioneer at a sale, advertised as being "without reserve," was held to constitute an offer which, so soon as the highest bid was made, became a binding contract between the auctioneer and the highest bidder that the goods should be sold to the latter. The law was stated thus by Martin, B.:

"The sale was announced by them (the auctioneers) to be 'without reserve.' This, according to all the cases both at law and in equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not.

"We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward,^c or that of a railway company publishing a timetable stating the times when, and the places to which, the trains run.^d It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. Upon the same principle, it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve."^e

This view of the rights of the highest bidder at an auction was adopted by Cozens-Hardy, J., in the more recent case of *Johnston v. Boyes*. ^{f 2}

^a *Harris v. Nickerson*, (1873) L.R. 8 Q.B. 286.

^b (1858) 1 E. & E. 206.

^c *Thornett v. Haines*, (1846) 15 M. & W. 367.

^d *Denton v. G. N. Railway Co.*, (1856) 5 E. & B. 860.

^e *Warlow v. Harrison*, (1858) 1 E. & E. 316.

^f [1899] 2 Ch. 75. In a sale by auction with notice that it is subject to reserve, both the offer by the highest bidder and its acceptance by the auctioneer are conditional upon the reserve price having been reached. *M'Manus v. Fortescue*, [1907] 2 K.B. 1.

¹ *Scales v. Chambers*, (1901) 113 Ga. 920.

² *Walsh v. St. Louis &c. Ass'n*, (1886) 90 Mo. 459 (advertisement that successful plans in competition would be chosen); *Guinsburg v. Downs Co.*, (1896) 165 Mass. 467 (auction).

In the "Smoke Ball" case^a the Carbolic Smoke Ball Company offered by advertisement to pay £100 to any one "who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions." It was added that £1,000 was deposited with the Alliance Bank "showing our sincerity in the matter."

Mrs. Carlill used the smoke ball as required by the directions; she afterwards suffered from influenza and sued the company for the promised reward. The company was held liable. It was urged that a notification of acceptance should have been made to the company. The court held that this was one of the class of cases in which, as in the case of reward offered for information or for the recovery of lost property, there need be no acceptance of the offer other than the performance of the condition. It was further argued that the alleged offer was an advertisement or puff which no reasonable person would take to be serious. But the statement that £1,000 had been deposited to meet demands was regarded as evidence that the offer was sincere.¹

Thus, too, statements made in the time-tables of a railway company must be regarded as something more than a mere inducement to travelers. They have been held to be promises made to each person who accepts the standing offer of the company to carry him for hire. The passenger then becomes entitled to the use of reasonable diligence on the part of the company that its promises as to the hours of arrival and departure shall be performed.^{b 2}

On the other hand, a bookseller's catalogue, with prices stated against the names of the books, would seem to contain a number of offers. But if the bookseller receives by the same post five or six letters asking for a particular book at the price named, to whom is he bound? To the man who first posted his letter of acceptance? How is this to be ascertained? The catalogue is clearly an invitation to do business, and not an offer.^{c 3}

^a [1892] 2 Q.B. 494; (1893) 1 Q.B. (C.A.) 256.

^b *Le Blanche v. L. & N.W. Railway Co.*, (1876) 1 C.P.D. 286.

^c *Grainger v. Gough*, [1896] A.C. 325, 334.

¹ See *Bull v. Talcot*, (1794, Conn.) 2 Root, 119; *Tarbell v. Stevens*, (1858) 7 Ia. 163.

² *Sears v. Eastern R.*, (1867, Mass.) 14 Allen, 433; *Gordon v. Manchester &c. Ry.*, (1872) 52 N.H. 596; *Heirn v. McCaughan*, (1856) 32 Miss. 17. See *St. Louis &c. Ry. v. Hardy*, (1891) 55 Ark. 134.

³ *Montgomery Ward & Co. v. Johnson*, (1911) 209 Mass. 89. See § 58, *ante*.

In all these cases the same question presents itself under various forms. Is there an offer? And, to constitute an offer, the words used, however general, must be capable of application to specific persons, and must be distinguishable from invitations to transact business, and from advertisement or puffery which does not contemplate legal relations.

CHAPTER IV

Form and Consideration

HISTORICAL INTRODUCTION

65. Form or consideration necessary. Offer and acceptance bring the parties together, and constitute the outward semblance of contract; but most systems of law require some further evidence of the intention of the parties, and in default of such evidence refuse to recognize an obligation. In English law this evidence is supplied by *form* and *consideration*; sometimes one, sometimes the other, sometimes both are required to be present in a contract to make it enforceable. By *form* we mean some peculiar solemnity attaching to the expression of agreement which of itself gives efficacy to the contract; by *consideration* we mean some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee.

66. History of formal and informal promises. Alike in English and Roman law, form, during the infancy of the system, is the most important ingredient in contract. The courts look to the formalities of a transaction as supplying the most obvious and conclusive evidence of the intention of the parties; the notion of consideration, if not unknown, is at any rate imperfectly developed. This is no place for an antiquarian discussion, however interesting, but we may say that English law starts, as Roman law may perhaps have started, with two distinct conceptions of contract. One, that a promise is binding if expressed in form of a certain kind: the other, that the acceptance of benefits of a certain kind imports a liability to repay them. The history of the Roman contracts is difficult and obscure. The theory of Sir Henry Maine, that they developed out of conveyance in an order of moral progression, has long been abandoned. But under many varieties of procedure we detect two leading ideas — the binding character of an undertaking clad in solemn form, and the readjustment of proprietary right where money or goods had been lent for consumption or use. In English law we find that before the end of the thirteenth century there were two liabilities analo-

gous in character to those I have just described: one formal, the promise under seal, which was looked on as something in the nature of a present grant:¹ one informal, arising from sale and delivery of goods, or loan of money, in which consideration has passed on one side, and the liability was expressed in the action of debt. Beyond this, the idea of enforcing an informal promise, simply because a benefit was accruing or was about to accrue to the promisor by the act or forbearance of the promisee, does not appear to have been entertained before the middle or end of the fifteenth century.

67. **The formal contract in English law.** The formal contract of English law is the *contract under seal*. Only by the use of this form could a promise, as such, be made binding, until the doctrine of consideration began to prevail. We have to bear in mind that it is to the form only that the courts look in upholding this contract; the *consensus* of the parties has not emerged from the ceremonies which surrounded its expression. Courts of law would not trouble themselves with the intentions of parties who had not couched their agreement in the solemn form to which the law attached legal consequences. Nor, on the other hand, where form was present would they demand or admit further evidence as to intention.

It is probably due to the influence of the court of chancery that, later on, the common-law courts began to take account of the intention of the parties. The idea of the importance of form thenceforth undergoes a curious change. When a contract comes before the courts, evidence is required that it expresses the genuine intention of the parties; and this evidence is found either in the solemnities of the contract under seal, or in the presence of consideration, that is to say, in some benefit to the promisor or loss to the promisee, granted or incurred by the latter in return for the promise of the former. Gradually consideration comes to be regarded as the important ingredient in contract, and then the solemnity of a deed is explained as making a contract binding because it "imports consideration," though in truth there is no question of consideration;² it is the form which brings about legal consequences.

¹ If this means a conveyance of a specific *res*, creating *property* in the promisee, it is the most obvious fiction. The relations created by the sealed promise were contractual and *in personam*; and thoughtful lawyers, then as now, could not fail to perceive this.

² The most enlightening case on this point is *Sharrington v. Strotton* (1564), as reported with arguments of counsel in 1 Plowden, 298. See also *Jackson v. Alexander*, (1808, N.Y.) 3 Johns. 484.

But we must return to the informal promise.

68. **The informal promise.** I have said that the only contracts which English law originally recognized, were the formal contract under seal, and the informal contract in which what we now call consideration was executed upon one side. How then do we arrive at the modern breadth of doctrine that any promise based upon consideration is binding upon the promisor? This question resolves itself into two others. How did informal executory contracts become actionable at all? How did consideration become the universal test of their actionability?

69. **Remedies for breach of promise.** To answer the first question we must look to the remedies which, in the early history of our law, were open to persons complaining of the breach of a promise, express or implied. The only actions of this nature, during the thirteenth and fourteenth centuries, were the actions of *covenant*, of *debt*, and of *detinue*. Covenant lay for breach of promises made under seal; debt for liquidated or ascertained claims, arising either from breach of covenant, or from non-payment of a sum certain, due for goods supplied, work done, or money lent; detinue^a lay for the recovery of specific chattels kept back by the defendant from the plaintiff. These were the only remedies based upon contract. An executory agreement therefore, unless made under seal, was remediless.

The remedy found for such promises is a curious instance of the shifts and turns by which practical convenience evades technical rules. The breach of an executory contract, until comparatively recent times, gave rise to a form of the action of *trespass on the case*.

This was a development of the action of trespass: trespass lay for injuries resulting from immediate violence: trespass on the case lay for the consequences of a wrongful act, and proved a remedy of a very extensive and flexible character.^b

70. **Origin of action of *assumpsit*.** Note the process whereby this action came to be applied to contract. It lay originally for a malfeasance, or the doing an act which was wrongful *ab initio*: it next was applied to a misfeasance, or improper

^a Detinue has been the subject of contention from the thirteenth century as to whether it is founded on contract or in wrong (Pollock and Maitland, *Hist. of English Law* (3d ed.), II. 180). In our own time the action of detinue has been decided to be an action of tort. *Bryant v. Herbert*, (1878) 3 C.P.D. 380. Detinue is in fact founded in bailment, but the contract of bailment imposes general common-law duties the breach of which may be treated, and should be treated, as a wrong. The judgment of Collins, L.J., in *Turner v. Stallibrass*, [1906] 1 Q.B. [C.A.] 69, states this clearly.

^b Spence, *Chancery Jurisdiction*, I. 241.

conduct in doing what it was not otherwise wrongful to do, and in this form it was applicable to promises part-performed and then abandoned or negligently executed to the detriment of the promisee: finally, and not without some resistance on the part of the courts, it came to be applied to a mere non-feasance, or neglect to do what one was bound to do.^a It was in this form that it adapted itself to executory contracts. The first reported attempt so to apply it was in the reign of Henry IV, when a carpenter was sued for a non-feasance because he had undertaken (*quare assumpsisset*) to build a house and had made default. The judges in that case held that the action, if any, must be in covenant, and it did not appear that the promise was under seal.^b

But in course of time the desire of the common-law courts to extend their jurisdiction, and their fear lest the chancery by means of the doctrine of consideration, which it had already applied to the transfer of interests in land, might enlarge its jurisdiction over contract, produced a change of view. Early in the sixteenth century it was settled that the form of trespass on the case known henceforth as the action of *assumpsit* would lie for the non-feasance, or non-performance of an executory contract; and the form of writ by which this action was commenced, perpetuated this peculiar aspect of a breach of a promise until recent enactments for the simplification of procedure.

It is not improbable that the very difficulty of obtaining a remedy for breach of an executory contract led in the end to the breadth and simplicity of the law as it now stands. If the special actions *ex contractu* had been developed so as to give legal force to informal promises, they might have been applied only to promises of a particular sort: a class of contracts similar to the consensual contracts of Roman law, privileged to be informal, would then have been protected by the courts, as exceptions to the rule that form or executed consideration was needed to support a promise.

But the conception that the breach of a promise was something akin to a wrong — the fact that it could be remedied only by a form of action which was originally applicable to wrongs — had a somewhat peculiar result. The cause of action was the non-performance of an undertaking; not the breach of a particular kind of contract; it was therefore of universal

^a Reeves (ed. Finlason), ii. 395, 396.

^b Pollock (8th ed.), p. 148.

application. Thus all promises would become binding, and English law avoided the technicalities which must needs arise from a classification of contracts. Where all promises may be actionable it follows that there must be some universal test of actionability, and this test was supplied by the doctrine of consideration.

71. **Origin of consideration as a test of actionability is uncertain.** It is a hard matter to say how consideration came to form the basis upon which the validity of informal promises might rest. Probably the "*quid pro quo*" which furnished the ground of the action of debt, and the detriment to the promisee on which was based the delictual action of *assumpsit*, were both merged in the more general conception of consideration as it was developed in the chancery.

For the Chancellor was wont to inquire into the intentions of the parties beyond the form, or even in the absence of the form in which, by the rules of common law, that intention should be displayed, and he would find evidence of the meaning of men in the practical results to them of their acts or promises. It was thus that the covenant to stand seised and the bargain and sale of lands were enforced in the chancery before the Statute of Uses; and the doctrine once applied to simple contract was found to be of great practical convenience. When a promise came before the courts they asked no more than this, "Was the party making the promise to gain anything from the promisee, or was the promisee to sustain any detriment in return for the promise?" if so, there was a "*quid pro quo*" for the promise, and an action might be maintained for the breach of it.^a

72. **Gradual growth of doctrine.** So silent was the development of the doctrine as to the universal need of consideration for contracts not under seal, and so marked was the absence of any express authority for the rule in its broad and simple

^a In the foregoing historical sketch I have refrained from citing authorities. To do so would encumber with detail a part of my book in which brevity is essential to the general plan. I may now refer the student to the chapter on Contract in the *History of English Law*, by Pollock and Maitland (2d ed.), vol. ii, pp. 184-233, a storehouse of learning upon the subject.*

* See also Ames, "History of Assumpsit," 2 *Harvard Law Review*, 1, 53; 3 *Essays in Anglo-Amer. Leg. Hist.* 259; Holmes, *The Common Law*, 285; Salmond, *Hist. of Cont.* 3 *L.Q.R.* 166, 3 *Essays in Anglo-Amer. Leg. Hist.* 320; Barbour, *Hist. of Cont. in Early Eng. Equity*, 4 *Oxford Studies in Social and Legal History*; Henry, "Consideration in Contracts," (1917) 26 *Yale Law Journal*, 664.

application, that Lord Mansfield in 1765 raised the question whether, in the case of commercial contracts made in writing, there was any necessity for consideration to support the promise. In the case of *Pillans v. Van Mierop*^a he held that consideration was only required as evidence of intention, and that where such evidence was effectually supplied in any other way, the want of consideration would not affect the validity of a parol promise. This doctrine was emphatically disclaimed in the opinion of the judges delivered not long afterwards in the House of Lords, in *Rann v. Hughes*.^b The logical completeness of our law of contract as it stands at present² is apt to make us think that its rules are inevitable and must have existed from all time. To such an impression the views set forth by Lord Mansfield in 1765 are a useful corrective.

CLASSIFICATION OF CONTRACTS

73. **Contracts are formal or simple.** English law recognizes only two kinds of contract, formal and simple: the deed or contract under seal, and the contract which depends for its validity on the presence of consideration. The legislature has, however, imposed upon some of these simple contracts the necessity of some kind of form, either as a condition of their existence or as a requisite of proof, and these stand in an intermediate position between the *deed* to which its form alone gives legal force, and the *simple contract* which rests upon consideration and is free from the imposition of any statutory form. In addition to these a certain class of obligation has been imported into the law of contract under the title of contracts of record, and though these obligations are wanting in the principal features of contract, it is necessary, in deference to established authority, to treat of them here.

74. **Classification.** Formal and simple contracts may then be further classified as follows:

^a (1765) 3 Burr. 1663.

^b (1778) 7 T.R. 350.

¹ See also *Cook v. Bradley*, (1828) 7 Conn. 57.

² This assumes altogether too much for the law as it stands to-day. As said by Holmes ("Path of the Law," 10 *Harvard Law Review*, 466), "the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty is generally an illusion, and repose is not the destiny of man." The causes and considerations that will induce courts to enforce a promise are no more certain now than in the days of Lord Mansfield or the days of the Year Books.

- | | |
|--|--|
| <p>A. <i>Formal.</i>
i.e., dependent for
 their validity
 upon their form.</p> | <p>{ 1. Contracts of record.
 2. Contracts under seal.</p> |
| <p>B. <i>Simple.</i>

i.e., dependent for
 their validity
 upon the pres-
 ence of con-
 sideration.</p> | <p>{ 3. Contracts required
 by law to be in
 some form other
 than under seal.
 4. Contracts for which
 no form is required.</p> |

It will be best to deal first with the essentially formal contracts, then with those forms which are superimposed upon certain simple contracts, and then with consideration, the requisite common to all simple contracts.

I. FORMAL CONTRACT

1. *Contracts of record*

75. **Kinds of contracts of record.** The obligations which are styled contracts of record are judgment and recognizance.^a

76. **Judgment.** And first as to judgment. The proceedings of courts of record are entered upon parchment rolls, and upon these an entry is made of the judgment in an action; when that judgment is final. A judgment awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded.

How it originates. Such an obligation may be the final result of a lawsuit when the court pronounces judgment;¹ or the

^a Statutes Merchant and Staple, and Recognizances in the nature of Statute Staple, are contracts of record long since obsolete; they were once important, because they were acknowledgments of debt, which, when duly made, created a charge upon the lands of the debtor.

¹ "A domestic judgment is a contract of record; it is the highest form of obligation." *Barber v. International Co.*, (1902) 74 Conn. 652, 656. A judgment by a United States court stands on the same basis in any state as if rendered by a court of that state. *Turnbull v. Payson*, (1877) 95 U.S. 418; *Oceanic & Co. v. Compania T. E.*, (1892) 134 N.Y. 461.

But a judgment is not a contract within the meaning of the clause in the United States Constitution forbidding a state to pass any law impairing the obligation of contracts (Art. i, § 10), whether the judgment be founded on tort [*Louisiana v. Mayor*, (1883) 109 U.S. 285] or contract [*Morley v. Lake Shore & C. Ry.*, (1892) 146 U.S. 162]. See also *O'Brien v. Young*, (1884) 95 N.Y. 428. Nor is it a contract which another state is bound to enforce in contravention of its own policy. *Anglo-American Prov. Co. v. Davis Prov. Co.*, (1902) 169 N.Y. 506.

The term "contract" as used in a statute may be construed to include

parties may agree to enter judgment in favor of one of them.¹ This may be done before litigation has commenced or while it is pending; and it is done by a contract of a formal character. A *warrant of attorney* may be an authority from one party to the other to enter judgment upon terms settled;² a *cognovit actionem* is an acknowledgment by one party of the right of the other in respect of a pending dispute, and confers a similar power.³

Characteristics. The characteristics of an obligation of this nature may be shortly stated as follows:

1. Its terms admit of no dispute, but are conclusively proved by production of the record.⁴

2. So soon as it is created the previously existing rights with which it deals merge, or are extinguished in it: for instance, A sues X for breach of contract or for civil injury: judgment is entered in favor of A either by consent or after

a Leake, *Contracts* (4th ed.), 105.

"judgment" where the legislative intent is to make a distinction between actions *ex contractu* and actions *ex delicto*. First Nat. Bk. v. Van Vooris, (1895) 6 S. Dak. 548; Moore v. Nowell, (1886) 94 N. Car. 265. *A fortiori*, if the legislative phrase is "implied contract." Gutta Percha Co. v. Mayor, (1888) 108 N.Y. 276.

¹ "Consent judgments are contracts in the most solemn form, sanctioned by the court, and cannot be collaterally attacked." Bank v. Board of Commissioners, (1898) 90 Fed. 7, 12.

² A warrant of attorney to obligee to confess judgment against the obligor is strictly construed. National Exchange Bank v. Wiley, (1904) 195 U.S. 257.

³ A domestic judgment rendered by a court having jurisdiction is conclusive. Simpson v. Hart, (1814, N.Y.) 1 Johns. Ch. 91; Morse v. Elms, (1881) 131 Mass. 151; Chouteau v. Gibson, (1882) 76 Mo. 38; Cromwell v. County of Sac, (1876) 94 U.S. 351.

Under the provision of the United States Constitution (Art. iv. § 1) requiring one state to give full faith and credit to the records and judicial proceedings of every other state, a judgment of one state authenticated in the manner prescribed by Congress (U.S. Rev. St. § 905) is conclusive in any other state unless impeached for want of jurisdiction in the court rendering it. Christmas v. Russell, (1866, U.S.) 5 Wall. 290; Thompson v. Whitman, (1873, U.S.) 18 Wall. 457; Hanley v. Donoghue, (1885) 116 U.S. 1. It may be impeached for want of jurisdiction. Knowles v. Gaslight Co., (1873, U.S.) 19 Wall. 58; Hall v. Lanning, (1875) 91 U.S. 160; Gilman v. Gilman, (1878) 126 Mass. 26.

A judgment of a foreign country is not conclusive in the United States if by the laws of the country rendering it a judgment of one of our courts is not conclusive there. Hilton v. Guyot, (1895) 159 U.S. 113. But if by the law of the country rendering the judgment a judgment by one of our courts would be allowed full and conclusive effect, the foreign judgment can be impeached here only for want of jurisdiction or for fraud. Ritchie v. McMullen, (1895) 159 U.S. 235; Fisher v. Fielding, (1895) 67 Conn. 91. See Tourigny v. Houle, (1896) 88 Me. 406.

trial: A has no further rights in respect of his cause of action, he only becomes creditor of X for the sum awarded.¹

3. Such a creditor has certain advantages which an ordinary creditor does not possess. He has a double remedy for his debt; he can have execution levied upon the personal property of the judgment debtor and so can obtain directly the sum awarded; he can also bring an action for the non-fulfillment of the obligation.² For this purpose the judgment not only of a court of record,³ but of any court of competent jurisdiction, British or foreign, other than a county court,⁴ is treated as creating an obligation upon which an action may be brought for money due.⁵

Before the Judgments Act, 1864 (27 and 28 Vict. c. 112), the judgment creditor had, during the lifetime of the debtor, a charge upon his lands; but since the passing of that statute lands are not affected by a judgment until they have been formally taken into execution.⁴

77. **Recognizances.** Recognizances are aptly described as "contracts made with the Crown in its judicial capacity."⁶ A

^a The essential features of a court of record are (1) that its "acts and judicial proceedings are enrolled for a perpetual testimony," (2) that it can fine or imprison for contempt. Stephen, *Comm.* (15th ed.), iii, pp. 314-5.

^b 51 & 52 Vict. c. 43, § 63. If action could be brought in a superior court on a county court judgment the cheap remedy which county courts are intended to give would become expensive. *Berkeley v. Eldarkin*, (1853) 1 E. and B. 805.

^c *Grant v. Easton*, (1883) 13 Q.B.D. 302, 303.

^d Pollock, (8th ed.), p. 162.

¹ A domestic judgment merges the cause of action litigated. *Miller v. Covert*, (1828, N.Y.) 1 Wend. 487; *Alie v. Nadeau*, (1899) 93 Me. 282; *Hart v. Seymour*, (1893) 147 Ill. 598, 620. But it must be the same cause of action. *Vanuxem v. Burr*, (1890) 151 Mass. 386; *Allen v. Colliery Engineers' Co.*, (1900) 196 Pa. 512; *Barber v. Kendall*, (1899) 158 N.Y. 401. A judgment by a sister state stands on the same basis as to merger: upon such judgments the plea must be *nul tiel record* and not *nul debet*. *Mills v. Duryee*, (1813, U.S.) 7 Cranch, 481; *Hampton v. M'Connell*, (1818, U.S.) 3 Wheat. 234; *Andrews v. Montgomery*, (1821, N.Y.) 19 Johns. 162; *Barnes v. Gibbs*, (1865) 31 N.J. L. 317.

Foreign judgments do not create a merger: the plea of *nul debet* is allowed. *Tourigny v. Houle*, (1896) 88 Me. 406; *Eastern Townships Bank v. Beebe*, (1880) 53 Vt. 177.

² The action is in debt. *Runnamaker v. Cordray*, (1870) 54 Ill. 303. The double remedy of execution on the judgment and action on the judgment may be pursued simultaneously. *Moor v. Towle*, (1854) 38 Me. 133; *Cushing v. Arnold*, (1845, Mass.) 9 Met. 23.

³ See preceding notes as to foreign and domestic judgments.

⁴ In most of the states a judgment duly docketed is a lien on the debtor's real estate within the county where so docketed. *Freeman on Judgments*, § 339; *Black on Judgments*, § 398; *Hutcheson v. Grubbs*, (1885) 80 Va. 251. Judgments in the Federal courts follow the law of the state where rendered. Act of Aug. 7, 1888, 25 St. at L. 357, 1 Supp. Rev. St. U.S. 603.

recognizance is a writing acknowledged by the party to it before a judge or officer having authority for the purpose, and enrolled in a court of record. It usually takes the form of a promise, with penalties for the breach of it, to keep the peace, to be of good behavior, or to appear at the assizes.¹

The following is an example:

"Be it remembered, that on —, A.B. of —, comes into the King's Bench Division of the High Court of Justice before me, one of His Majesty's Justices, and acknowledges to owe our Sovereign Lord the King the sum of £—, to be levied upon his goods and chattels, lands and tenements, to His Majesty's use upon condition that if the said A.B. shall be of good behaviour for the space of —, to be computed from and after —, and keep the peace towards all His Majesty's liege subjects, and especially towards C.D. and not depart that Court without leave, then this recognizance to be void or else to remain in full force." ^a

79. **Not true contracts.** There is little of the true nature of a contract in the so-called contracts of record. *Judgments* are obligations dependent for their binding force, not on the consent of the parties, but upon their direct promulgation by the sovereign authority acting in its judicial capacity.² *Recognizances* are promises made to the sovereign, with whom, both by the technical rules of English law and upon the theories of jurisprudence, the subject cannot contract. We need consider these obligations no further.

^a Crown Office Rules 1906, Appendix, Form 198.

¹ See *State of Maine v. Chandler*, (1887) 79 Me. 172, for a recognizance in a criminal case. "It is an obligation of record founded upon contract, and entered into by the recognizers upon certain conditions, upon the breach of which the recognizance became forfeited, and an absolute debt of record, in the nature of a judgment, was created, and upon which *scire facias* properly lies for the recovery of the forfeiture."

"A recognizance is a debt confessed to the state which may be avoided upon the conditions stated. At common law the forfeiture of the recognizance was equivalent to a judgment." *Smith v. Collins*, (1889) 42 Kans. 259. Unless the statute expressly so requires, it need not be signed but is acknowledged in open court. *McNamara v. People*, (1899) 183 Ill. 164. It must be distinguished from a bail-bond. *State v. McGuire*, (1889) 42 Minn. 27; *People v. Barrett*, (1903) 202 Ill. 287, 297. An action of debt lies upon a recognizance. *Green v. Ovington*, (1819, N.Y.) 16 Johns. 55; *Bodine v. Commonwealth*, (1854) 24 Pa. 69. Or *scire facias*. *Bodine v. Comm. supra*; *McNamara v. People, supra*. Infancy is not a defense by the principal. *State v. Weatherwax*, (1874) 12 Kans. 463.

² It is now customary to classify judgments among quasi-contracts or non-contract debts.

2. *Contract under seal*

80. **The contract under seal.** The only formal contract of English law is the *contract under seal*, sometimes also called a deed and sometimes a specialty. It is the only *formal contract*, because it derives its validity neither from the fact of agreement, nor from the consideration which may exist for the promise of either party, but from the *form* in which it is expressed. Let us then consider (1) how the contract under seal is made; (2) in what respects it differs from simple contracts; (3) under what circumstances it is necessary to contract under seal.

(1) *How a contract under seal is made*

81. **Formalities.** A deed must be in writing or printed, on paper or parchment.^a It is often said to be executed, or made conclusive as between the parties, by being "signed, sealed, and delivered." (1) Of these three things there is some doubt as to the necessity of a signature,^b though no one, unless ambitious of giving his name to a leading case, would omit to sign a deed.¹ (2) But that which identifies a party to a deed with the execution of it is the presence of his *seal*;² that which

^a *Sheppard, Touchstone*, 53.

^b *Cooch v. Goodman*, (1842) 2 Q.B. 597.

¹ Signature held not necessary in *Taunton v. Pepler*, (1820) 6 Maddock, 166; *Cherry v. Heming*, (1849) 4 Exch. 631.

² A seal at common law is an impression upon wax or other adhesive substance. *Warren v. Lynch*, (1809, N.Y.) 5 Johns. 239. Some courts still regard this as the only valid seal unless some other form is prescribed by statute. *Solon v. Williamsburgh Sav. Bk.*, (1889) 114 N.Y. 122; *Bates v. Boston &c. R.*, (1865, Mass.) 10 Allen, 251. In other jurisdictions there has been a relaxation of the rule in favor of any impression, mark or pen scroll intended for a seal. *Pierce v. Indseth*, (1882) 106 U.S. 546; *Jacksonville R. v. Hooper*, (1896) 160 U.S. 514; *Lorah v. Nissley*, (1893) 156 Pa. 329; *Underwood v. Dollins*, (1871) 47 Mo. 259. In many states it is provided by statute that a scroll or other device with the pen shall be sufficient. *Stimson, Am. St. Law*, §§ 1564-65. In New York the word "seal" or the letters "L. S." (*locus sigilli*), or anything affixed by an adhesive substance, may be used. N.Y. Statutory Construction Law, § 13. A recital of the seal in the instrument is generally held to be unnecessary. *Lorah v. Nissley, supra*; *Eames v. Preston*, (1858) 20 Ill. 389; *Wing v. Chase*, (1853) 35 Me. 260; *Osborn v. Kistler*, (1878) 35 Oh. St. 99. But some states require it. *Bradley Salt Co. v. Norfolk Imp. Co.*, (1897) 95 Va. 461; *Blackwell v. Hamilton*, (1872) 47 Ala. 470. Some do not require it in the case of a common law seal but do in the case of a pen-scroll seal. *Alt v. Stoker*, (1894), 127 Mo. 466. But such a recital if present may estop the maker from denying that he intended to execute a sealed instrument. *Metropolitan Life Ins. Co. v. Bender*, (1891) 124 N.Y. 47. Or if broad enough in its terms may even estop the grantee in a deed who does not sign. *Atlantic Dock Co. v. Leavitt*, (1873) 54 N.Y. 35. But if a seal is unnecessarily used it may be discarded as surplusage. *Bridger v. Goldsmith*, (1894) 143 N.Y. 424.

makes the deed operative, so far as he is concerned, is the fact of its *delivery* by him.¹ (3) Delivery is effected either by actually handing the deed to the other party to it, or to a stranger for his benefit, or by words indicating an intention that the deed should become operative though it is retained in the possession of the party executing.² In the execution of a deed seals are commonly affixed beforehand, and the party executing the deed signs his name, places his finger on the seal intended for him, and utters the words "I deliver this as my act and deed." Thus he at once identifies himself with the seal, and indicates his intention to *deliver*, that is, to give operation to the deed.

82. *Escrow*. A deed may be delivered subject to a condition; it then does not take effect until the condition is performed: during this period it is termed an *escrow*, but immediately upon the fulfillment of the condition it becomes operative and acquires the character of a deed. There is an old rule that a deed, thus conditionally delivered, must not be delivered to one who is a party to it, else it takes effect at once, on the ground that a delivery in fact outweighs verbal conditions. But the modern cases appear to show that the intention of the parties prevails if they clearly meant the deed to be delivered conditionally.³

¹ *Xenos v. Wickham*, (1867) L.R. 2 H.L. 296.

² *Sheppard, Touchstone*, 69; *London Freehold Co. v. Lord Suffield*, [1897] 2 Ch. at p. 621.

³ A deed is effective from the day of its delivery, not from the day of its date. *Stone v. Bale*, (1693) 3 Lev. 348; Y.B. 34 Lib. Ass. pl. 7; *Goddard's Case*, (1584) 2 Co. Rep. 4b.

⁴ *Gorham's Adm'r v. Meacham's Adm'r*, (1891) 63 Vt. 231. "Delivery may be effected by words without acts, or by acts without words, or by both acts and words." *Ruckman v. Ruckman*, (1880) 32 N.J. Eq. 259, 261; *Jordan v. Davis*, (1884) 108 Ill. 336; *Johnson v. Gerald*, (1897) 169 Mass. 500; *Thoroughgood's Case*, (1612) 9 Co. Rep. 136b (words not necessary); *Shelton's Case*, (1582) Cro. Elis. 7; *Chamberlain v. Stanton*, (1588) Cro. Elis. 122. Mere intention is insufficient. *Bush v. Genther*, (1896) 174 Pa. 154; *Babbitt v. Bennett*, (1897) 68 Minn. 260. Acceptance of the deed has also been held to be a requisite. *Meigs v. Dexter*, (1898) 172 Mass. 217; *Bowen v. Prudential Ins. Co.*, (1913) 178 Mich. 63. *Contra*, *Roberts v. Security Co.*, [1897] 1 Q.B. 111.

The validity of a delivery of any formal document is determined by the same rules, whether it is a sealed instrument or not. See *Sarasohn v. Kamaiky*, (1906) 193 N.Y. 203 (delivery of a certified copy, or counterpart, of a written contract). Notice of the receipt of the sealed document, and of the covenantee's assent thereto is not necessary. *U.S. Fidelity Co. v. Riefler*, (1915) 239 U.S. 17.

⁵ Delivery of a deed or conveyance of lands cannot be made in escrow to the grantee. *Worrall v. Munn*, (1851) 5 N.Y. 229; *Braman v. Bingham*, (1863) 26 N.Y. 483; *Baker v. Baker*, (1896) 159 Ill. 394; *Fairbanks v. Metcalf*, (1811) 8 Mass. 230; *Darling v. Butler*, (1891) 45 Fed. 332. This

83. Indenture and Deed Poll. The distinction between a *deed poll* and an *indenture* is no longer important since 8 & 9 Vict. c. 106, § 5. Formerly a deed made by one party had a polled or smooth-cut edge, a deed made between two or more parties was copied for each on the same parchment, and the copies cut apart with indented edges, so as to enable them to be identified by fitting the parts together. Such deeds were called indentures. An indented edge is not now necessary to give the effect of an indenture to a deed purporting to be such.

(2) *Characteristics of contract under seal*

84. Estoppel. Estoppel is a rule of evidence whereby a man is not allowed to disprove facts in the truth of which he has by words or conduct induced others to believe, knowing that they might or would act on such belief. This rule of evidence is of strict application to statements made under seal. Recitals and other statements in a deed, if express and clear, are conclusive against the parties to it in any litigation arising upon the deed.^a "Where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted."^b

^a *Onward Building Society v. Smithson*, [1893] 1 Ch. 1.

^b *Taunton, J., in Bowman v. Taylor*, (1834) 2 A. & E. 278.

rule is generally extended to other specialties. *Easton v. Driscoll*, (1893) 18 R.I. 318; *Jones v. Shaw*, (1878) 67 Mo. 667; *Ordinary v. Thatcher*, (1879) 41 N.J.L. 403. But some states confine the rule to deeds relating to lands. *Blewitt v. Boorum*, (1894) 142 N.Y. 357. In *Hawksland v. Gatchel*, (1600, Q.B.) Cro. Elis. 835, it was held that if the deed is delivered to the grantee in escrow, it is not the grantor's deed until the condition is performed, because the intention is clear. *Contra*: *Whyddon's Case*, (1597, C.B.) Cro. Elis. 520; *Williams v. Green*, (1601, C.B.) Cro. Elis. 884; *Thoroughgood's Case*, (1610) 9 Co. Rep. 136b ("the law respects the delivery to the party himself and rejects the words which will make the express delivery to the party, upon the matter no delivery").

See in full agreement with the text, 4 Wigmore, Evidence, § 2408.

¹ Estoppel by deed. *Gibson v. Lyon*, (1885) 115 U.S. 439; *Johnson v. Thompson*, (1880) 129 Mass. 398; *Orthwein v. Thomas*, (1889) 127 Ill. 554; *Metropolitan Life Ins. Co. v. Bender*, (1891) 124 N.Y. 47; *Atlantic Dock Co. v. Leavitt*, (1873) 54 N.Y. 35. "In the absence of fraud, neither inadequacy nor failure to pay the consideration named in a specialty, can be shown for the purpose of defeating it. The consideration may be explained. It may be shown to be not paid at all, without any effect upon the validity of the instrument. If partly or wholly unpaid, the instrument, under the circumstances, will be construed as containing a promise, by implication, to pay, which may be enforced." *Bibelhausen v. Bibelhausen*, (1915) 159 Wis. 365. See to same effect: *Jackson v. Alexander*, (1808, N.Y.) 3 Johns. 483; *Roberts v. Security Co.*, [1897] 1 Q.B. 111; *Higdon v. Thomas*, (1827, Md.) 1 Harr. & G. 139, 145.

An insurance company disputed payment on a life policy on the ground of misrepresentation made by the assured in the proposal which was recited in the policy. It was found as a fact that the proposal was not made by the assured, and the company then contended that if there was no proposal there could be no policy. The court held that the company, by issuing a policy in which the proposal was recited and by receiving premiums, were estopped from denying the existence of the proposal.^a

85. Merger. Where two parties have made a simple contract for any purpose, and afterwards have entered into an identical engagement by deed, the simple contract is *merged* in the deed and becomes extinct. This extinction of a lesser in a higher security, like the extinction of a lesser in a greater interest in lands, is called *merger*.¹

86. Limitation of actions. A right of action arising out of simple contract is barred if not exercised within six years.

A right of action arising out of a contract under seal is barred if not exercised within twenty years.²

These general statements must be taken with some qualifications to be discussed hereafter.^b

87. Remedies against debtor's estate. If a man dies leaving debts unpaid, those creditors whose rights are evidenced by deed had, and still have, some advantages which are not possessed by creditors whose rights rest upon simple contract.³

In administering the *personal* estate of a testator or intestate person, creditors by specialty were formerly entitled to a priority over creditors by simple contract. Their privilege in this respect is taken away by 32 & 33 Vict. c. 46.

The creditor by specialty had also at one time an advantage in dealing with the *real* estate of the debtor.

^a *Pearl Life Insurance Co. v. Johnson*, [1909] 2 K.B. 288.

^b See § 433, *post*.

Only the parties to a sealed instrument can sue or be sued upon it. *Briggs v. Partridge*, (1876) 64 N.Y. 357. But this rule can have no effect where all distinction between sealed and unsealed instruments is abolished. *J. B. Streeter Co. v. Janu*, (1903) 90 Minn. 393. And see also § 293, *post*.

¹ *Clifton v. Jackson Iron Co.*, (1889) 74 Mich. 183; *Schoonmaker v. Hoyt*, (1896) 148 N.Y. 425. See § 423, *post*.

² The period varies in the United States from ten to twenty years. *Wood on Limitation of Actions*, § 31, and Appendix.

³ In the American states generally specialties are given no preference over simple contracts in the administration of estates. 2 Kent, Comm. 416-19.

If the debtor bound himself and his heirs by deed, the common law gave to the specialty creditor a right, which the creditor by simple contract did not possess, to have his debt satisfied by the heir out of the lands of his ancestor: the liability thus imposed on the heir was extended to the devisee by 3 & 4 Will. and Mary, c. 14, § 2.

This Act, repealed and re-enacted with extensions of the creditor's remedy in 1830, has been followed by legislation which has gradually placed the simple contract creditor on an equal footing with the specialty creditor as regards the real estate of the debtor.

First by 3 & 4 Will. 4, c. 104, real estate not charged with the payment of the debts of the deceased might be administered in a court of equity for the payment of debts, but the simple contract creditor ranked after the specialty creditor.

Then by the Administration of Estates Act, 1869,^a the priority of the specialty creditor was taken away, but the simple contract creditor remained at this disadvantage that unless he obtained the administration of the estate in chancery he had no claim on the realty.

Finally, the Land Transfer Act, 1897,^b creates a "real representative" who is to administer real estate, subject to the same liabilities as to debt as if it were personal estate. There is no longer a need for administration by the court to place the two kinds of creditor on the same footing. The specialty creditor only retains this advantage that the fund available for him is not liable to the executor's right of retainer unless for a specialty debt.^c

88. Gratuitous promise under seal. A gratuitous promise, or promise for which the promisor obtains no consideration present or future, is binding if made under seal, but is of no legal effect if made verbally, or in writing not under seal.¹ I have

^a 32 & 33 Vict. c. 46.

^b 60 & 61 Vict. c. 65.

^c *In re Jones*, (1885) 31 Ch. D. 440. The right of retainer is the right of the executor to pay to himself, before any other creditor of equal rank, any debt due to him by the deceased.

¹ In the absence of statutory changes, gratuitous promises under seal are valid and enforceable. *McMillan v. Ames*, (1885) 33 Minn. 257; *Krell v. Codman*, (1891) 154 Mass. 454; *Anderson v. Best*, (1896) 176 Pa. 498; *Cosgrove v. Cummings*, (1900) 195 Pa. 497; *Barrett v. Carden*, (1893) 65 Vt. 431; *Ducker v. Whitson*, (1893) 112 N. Car. 44; *Storm v. United States*, (1876) 94 U.S. 76. But see *Swift v. Hawkins*, (1768, Pa.) 1 Dall. 17 (following equity rule at law in absence of equity court); *Matlock v. Gibson*, (1832, S.C.) 8 Rich. L. 437 (holding seal only presumptive evidence of consideration).

STATUTORY CHANGES. (1) Some states, while preserving the distinction between sealed and unsealed instruments, make the presence of the seal only presumptive evidence of consideration, and permit the presumption to be rebutted by evidence of no consideration. Ala. Code, § 3288; Mich. Comp. L. § 10185-86; N.J. Gen. St., (1895) p. 1413, § 72; N.Y. Code Civ. Proc. § 840 ("upon an executory instrument"); Ore. Annot. Codes & St., (1902) § 765; Wis. Annot. St. § 4195. This legislation probably makes it impossible (except in New Jersey) to enforce a gratuitous executory promise under seal. *Anthony v. Harrison*, (1878) 14 Hun, 198, aff'd 74 N.Y. 613;

noted above that this feature of contracts under seal has been explained by the solemnity of their form, which is said to import consideration, and so to supply evidence of intention. But this is historically untrue. The form bound the promisor, and not the intention of which the form was the expression. The doctrine of consideration is of later date, and as it has developed, has tended to limit this peculiarity of the promise under seal by the introduction of exceptions to the general rule that a gratuitous promise so made is binding.

At common law, contracts in restraint of trade, though under seal, must be shown to be reasonable; and one test of the reasonableness of the transaction is the presence of consideration.⁶ ¹ And the rule is general that if there be in fact consid-

⁶ *Mallan v. May*, (1843) 11 M. & W. 665.

Baird v. Baird, (1894) 81 Hun, 300, aff'd 145 N.Y. 659; *Williams v. Whittell*, (1902) 69 N.Y. App. Div. 340; *Hobbs v. Electric Lt. Co.*, (1889) 75 Mich. 550. But in New Jersey the legislation is so construed as not to destroy the common law effect of the seal in a case where no consideration was intended, and it is limited in its effect to cases where a consideration was intended and has failed: hence in New Jersey a gratuitous promise under seal is still enforceable where the seal is used in order to give validity to the promise. *Aller v. Aller*, (1878) 40 N.J. L. 446. In New York by express statutory provision and in New Jersey by judicial construction, the legislation does not apply to executed contracts and conveyances. *Matter of Mitchell*, (1891, N.Y.) 61 Hun, 372; *Talbert v. Storum*, (1893) 21 N.Y. Supp. 719 (assignment of life insurance policy); *Noble v. Kelly*, (1869) 40 N.Y. 415 (release); *Homans v. Tyng*, (1900) 56 N.Y. App. Div. 383 (release); *Finch v. Simon*, (1901) 61 N.Y. App. Div. 139 (release); *Braden v. Ward*, (1880) 42 N.J. L. 518 (release); *Wain v. Wain*, (1896) 58 N.J. L. 640 (release). But see *Wabash Western Ry. v. Brow*, (1895) 65 Fed. 941, 952 (sealed release under Michigan statute not conclusive as to consideration).

(2) Many states abolish all distinction between written sealed and unsealed instruments, and most of these provide that any written contract shall have a rebuttable presumption of consideration. Cal. Civil Code, § 1629; Idaho Civil Code, § 2730; Iowa Code, § 3068; Ind. Rev. St. (Burns' ed.) § 454; Kans. Gen. St. Ch. 114, §§ 6, 8; Ky. St. §§ 471-72; Minn. Rev. Laws, (1905) § 2652; Miss. Code, §§ 4079-82; Mo. R. S. §§ 893-94; Mont. Civ. Code, §§ 2190, 2169; Neb. Comp. St. Ch. 81, § 1; N. Dak. Rev. Code, (1905) § 5338; Oh. R.S. § 4; S. Dak. Annot. St. § 4738; Tenn. Code, §§ 2478-80; Texas R.S. Art. 4862-63; Utah R.S. §§ 1976, 3399; Wyo. R.S. § 2749. See construing such statutes, *Bender v. Been*, (1889) 78 Iowa, 283 (written release of debt upon part payment not binding); *Winter v. Kansas City Cable Ry.*, (1900) 160 Mo. 159 (same, release under seal); *Hale v. Dressen*, (1898) 73 Minn. 277 (same); *J. B. Streeter Co. v. Janu*, (1903) 90 Minn. 393 (undisclosed principal liable on sealed contract); *Ames v. Holderbaum*, (1890) 44 Fed. 224 (same); *Bradley v. Rogers*, (1885) 33 Kans. 120 (private seals abolished); *Garrett v. Land Co.*, (1894) 94 Tenn. 459 (same); *Murray v. Beal*, (1901) 23 Utah, 548 (same).

¹ Actual consideration is necessary to the validity of covenants in restraint of trade. *Alger v. Thatcher*, (1837, Mass.) 19 Pick. 51; *Gompers v. Rochester*, (1867) 56 Pa. 194.

eration for a deed, the party sued upon it may show that the consideration was illegal, or immoral, in which case the deed will be void.^{a 1}

But it is in the chancery that we find this privilege most encroached upon. The idea of consideration as a necessary element of contract as well as of conveyance, if it did not actually originate in the chancery, has always met with peculiar favor there. It was by means of inferences drawn from the presence or absence of consideration that the covenant to stand seised, the bargain and sale of lands, and the resulting use first acquired validity. And in administering its peculiar remedies, where they are applicable to contract, equity followed the same principles.

The court will not grant *specific performance* of a gratuitous promise, whether or no the promise is made by deed.² And absence of consideration is corroborative evidence of the presence of fraud or undue influence, on sufficient proof of which the court will *rectify* or *cancel* the deed.³

89. Bonds. The best illustration of a gratuitous promise under seal is supplied by a *bond*. A bond may be technically described as a promise defeasible upon condition subsequent; that is to say, it is a promise under seal by A to pay a sum of money, which promise is to cease to be binding upon him if a condition stated in the bond is performed. The promise, in fact, imposes a penalty for the non-performance of the condition which is the real object of the bond. The condition desired to be secured may be a money payment, an act or a forbearance. In the first case the instrument is called a common money bond: in the second a bond with special conditions.

For instance:

A promises X under seal, that on the ensuing Christmas Day he will pay to X £500; with a condition that if before that day he has paid to X £250 the bond is to be void.

^a *Collins v. Blanton*, (1767) 1 Sm. L.C. (11th ed.), p. 264.

¹ *Sterling v. Sinnickson*, (1820) 5 N.J.L. 756; *Brown v. Kinsey*, (1879) 81 N.C. 245; *Polson v. Stewart*, (1897) 167 Mass. 211.

² *Crandall v. Willig*, (1897) 166 Ill. 233. A seal imports consideration in equity. *Mills v. Larrance*, (1900) 186 Ill. 635; *Carey v. Dyer*, (1897) 97 Wis. 554 (statutory).

³ Absence or inadequacy of consideration as corroborative evidence of fraud or undue influence. *Hall v. Perkins*, (1829, N.Y.) 3 Wend. 626. See *Seymour v. Delancy*, (1824, N.Y.) 3 Cow. 445; *Federal Oil Co. v. Western Oil Co.*, (1902) 112 Fed. 373.

A promises X, under seal, that on the ensuing Christmas Day he will pay to X £500; with a condition that if before that day M has faithfully performed certain duties the bond is to be void.

Common law has differed from equity in its treatment of bonds much as it did in its treatment of mortgages.

Common law took the contract in its literal sense and enforced the fulfillment of the entire promise upon breach of the condition.

Equity looked to the object which the bond was intended to secure, and would restrain the promisee from obtaining more than the amount of money due under the condition, or the damages which accrued to him by its breach.¹

Statutes have long since limited the rights of the promisee to the actual loss sustained by breach of the condition.²

(3) *When it is essential to employ the contract under seal*

90. Statutory requirements. It is sometimes necessary for the validity of a contract to employ the form of a deed.

A transfer of shares in companies governed by the Companies Clauses Act;³ a transfer of a British ship or any share therein;⁴ a lease of lands, tenements, or hereditaments for more than three years, must be made under seal.⁵

91. Common-law requirements. Common law requires in two cases that a contract should be made under seal.

^a 8 & 9 Will. III, c. 11; 4 & 5 Anne, c. 3; 23 & 24 Vict. c. 126, § 25.

^b 8 & 9 Vict. c. 16, § 14.

^c 57 & 58 Vict. c. 60, § 24. See Form in Schedule A of the Act.

^d 29 Car. II, c. 3, §§ 1 & 2, and 8 & 9 Vict. c. 106, § 3.

¹ *Parks v. Wilson*, (1724) 10 Mod. 515; *Hobson v. Trevor*, (1723) 2 P. Wms. 191; *Alison's Case*, (1724) 9 Mod. 62; *Gardiner v. Pullen*, (1700) 2 Vern. 394; Vin. Abr. tit. Obligation, (T) 3.

² N.Y. Code Civ. Proc. § 1915, provides that the defeasance clause is to be construed as a covenant to pay the sum or perform the act specified. For the general American practice as to judgments on bonds, see 5 Cyc. 855-58; 3 Encyc. of Pldg. & Prac. 670.

³ Transfers of shares in corporations need not be under seal in the United States. Cook on Corps. § 377; 10 Cyc. 595.

⁴ Ships may be transferred by parol in the United States. *Calais Steamboat Co. v. Van Pelt*, (1862, U.S.) 2 Black, 372, 385; *The Amelie*, (1867, U.S.) 6 Wall. 18; *The Marion S. Harris*, (1898) 85 Fed. 798. Provisions are made, however, for a more formal conveyance and record in order to protect the purchaser. U.S. Rev. St. § 4192.

⁵ While conveyances of interests in lands are usually made under seal, over one-half of the American states have dispensed with the necessity of a seal in such conveyances. See Birdseye's *Abbott's Clerks and Conveyancers Assistant*, (1899) pp. 15-61. Apparently a seal is unnecessary in New York. Real Prop. Law, §§ 207, 208; *Leask v. Horton*, (1902, N.Y.) 39 Misc. 144.

(a) A gratuitous promise, or contract in which there is no consideration for the promise made on one side and accepted on the other, is void unless made under seal.

It is not really unreasonable, or practically inconvenient that the law should require particular solemnities, to give to a gratuitous promise the force of a binding obligation.^{a 1}

(b) A corporation aggregate can only be bound by contracts under the corporate seal.²

"The seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting however numerously attended is, after all, not the act of the whole body. Every member knows he is bound by what is done under the common seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing. Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation."^b

To this rule there are certain exceptions. Matters of trifling importance, or daily necessary occurrence, do not require the form of a deed. The supply of coals to a workhouse, the hire of an inferior servant, furnish instances of such matters. And where a municipal corporation owned a graving dock in constant use, it was held that agreements for the admission of ships might be made by simple contract.^c

Trading corporations may through their agents enter into simple contracts relating to the objects for which they were created.

"A company can only carry on business by agents — managers and others; and if the contracts made by these persons are contracts which relate to the objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding on the company, though not under seal."^d

The Companies (Consolidation) Act,^e 1908, § 76 (re-enacting a similar provision in an earlier Act), enables a company incorporated

^a *Foakes v. Beer*, (1884) 2 App. Cas. 606.

^b *Mayor of Ludlow v. Charlton*, (1840) 6 M. & W. 815.

^c *Nicholson v. Bradfield Union*, (1866) L.R. 1 Q.B. 630; *Wells v. Mayor of Kingston on Hull*, (1875) L.R. 10 C.P. 402.

^d *South of Ireland Colliery Co. v. Waddle*, (1869) L.R. 3 C.P. 469.

^e 8 Edw. VII. c. 60.

¹ See § 88, note, *ante*.

² In the American states a corporation is required to use a seal only when a natural person would be required to use one. *Cook on Corp.* § 721; 10 Cyc. 1004-08; *Bank v. Patterson*, (1813, U.S.) 7 Cranch, 299; *Gottfried v. Miller*, (1881), 104 U.S. 521; *Green Co. v. Blodgett*, (1895) 159 Ill. 169; *Leinkauf v. Calman*, (1888) 110 N.Y. 50. (It is to be noted, however, that a few states while dispensing with the necessity of a seal upon the deeds of individuals still require it for corporate deeds.) It is generally provided that a corporate seal may consist of a mere pen-scroll. *Blood v. La Serena &c. Co.*, (1896) 113 Cal. 221; *Jacksonville &c. Co. v. Hooper*, (1895) 160 U.S. 514.

under the Companies Acts to enter, through its agents, into contracts in writing or by parol, in cases where such contracts could be entered into by private persons in like manner; and the legislature has also in some other cases freed corporations from the necessity of contracting under seal and provided different forms in which their common assent may be expressed.

There has been some conflict of judicial decision as to the liability of a corporation in cases where no contract has been made under seal but where goods have been supplied, or work done for the purposes for which the corporation exists.¹ The point has now been settled in *Lawford v. Billericay Rural Council*.^a

The Committee of a Rural District Council employed an engineer, already engaged by the corporation for certain purposes, to do a number of acts in reference to work for which he had not been engaged. The committee had no power to bind the corporation by entering into contracts, but their minutes were approved, and their acts thereby affirmed and adopted by the council. The court held that the work done was work for the doing of which the corporation was created, and that having taken the benefit of the work they could not refuse to pay for it. It should be noted that an executory contract of employment made with an engineer, not under seal, would clearly have given no right of action to the engineer or to the corporation.

It would appear that where a corporation has done all that it was bound to do under a simple contract it may in like manner sue the other party for a non-performance of his part. But a part-performance of a contract by a corporation will not take the case out of the general rule, and entitle it to sue.^b

But the exceptional case of contracts made by an urban authority under the powers and for the purposes of the Public Health Act, 1875,^c of a value or amount exceeding £50 requires notice. By § 174 of the Act, such contracts must be under seal, and in the face of this positive direction of the statute the common law exceptions above referred to have no application. An urban authority may therefore take the full benefit of such contracts and yet set up afterwards the absence of a seal as a complete defense.^d But the courts have shown themselves unwilling to extend a principle which enables local authorities to avoid payment of their debts, and have held that the decision in *Lawford v. Billericay Rural Council* continued to apply even in the case of an urban authority, where the contract sued upon was made under powers given by a special Act, and not by the Public Health Act, 1875.^e

^a [1903] 1 K.B. 772.

^b *Fishmongers' Company v. Robertson*, (1843) 5 M. & Gr. 192; *Mayor of Kidderminster v. Hardwick*, (1873) L.R. 9 Ex. 24.

^c 38 & 39 Vict. c. 55.

^d *Young v. Leamington Corporation*, (1883) 8 App. Cas. 517.

^e *Douglas v. Rhyl U.D.C.*, [1913] 2 Ch. 407.

¹ Where a corporation has received a benefit under a contract *ultra vires*, it is liable in quasi-contract. *Central Trans. Co. v. Pullman Car Co.*, (1890) 139 U.S. 24, 60. See Woodward on Quasi-Contracts, chap. 9; Machen on Corps. chap. 16.

II. SIMPLE CONTRACT

92. All simple contracts require consideration. We have now dealt with the contract which is valid by reason of its form alone, and we pass to the contract which depends for its validity upon the presence of consideration. In other words, we pass from the formal to the simple contract, or from the contract under seal to the *parol* contract, so called because, with certain exceptions to which I will at once refer, it can be entered into by word of mouth.

93. Some simple contracts are not enforceable if not in writing. Certain simple contracts cannot be enforced unless written evidence of the terms of the agreement and of the parties to it is produced; but writing is here needed, not as giving efficacy to the contract, but as evidence of its existence. Consideration is as necessary as in those cases in which no writing is required: "if contracts be merely written and not specialties, they are *parol* and consideration must be proved."

These are therefore none the less simple contracts, because written evidence of a certain kind is required concerning them.

94. Statutory requirements. The statutory requirements of form in simple contract are briefly as follows:

1. A bill of exchange needed to be in writing by the custom of merchants, adopted into the common law. A promissory note was subject to a like requirement by 3 & 4 Anne, c. 8. Both documents are now governed by the Bills of Exchange Act, which further provides that the acceptance of a bill of exchange must also be in writing.^{a 1}

2. Assignments of copyright under the Copyright Act, 1911,^b must be in writing.²

3. Contracts of marine insurance must be made in the form of a policy.^{c 3}

4. The acceptance or transfer of shares in a company is usually required to be in a certain form by the Acts of Par-

^a 45 & 46 Vict. c. 61, § 17.

^b 1 & 2 Geo. V, c. 46.

^c 54 & 55 Vict. c. 26, § 93; 6 Edw. VII, c. 41, § 22.

¹ The same provisions are found in the Negotiable Instruments Law, §§1, 132 (N.Y. §§ 20, 220) now in force in upwards of thirty American jurisdictions.

² U.S. Rev. St. § 4955 (copyrights), § 4898 (patents).

³ Insurance contracts need not be in writing at common law. *Mobile &c. Co. v. McMillan*, (1858) 31 Ala. 711. Statutes providing for a standard fire policy do not prohibit oral insurance contracts but simply introduce into them the statutory terms. *Relief Fire Ins. Co. v. Shaw*, (1876) 94 U.S. 574.

liament which govern companies generally or refer to particular companies.¹

5. An acknowledgment of a debt barred by the Statutes of Limitation must be in writing signed by the debtor, or by his agent duly authorized.²

6. Certain special contracts are required to be in writing by particular statutes: e.g., special contracts with Railway Companies for the carriage of goods, under the Railway and Canal Traffic Act, 1854, § 7.³

7. The Statute of Frauds, 1677, § 4, requires that written evidence should be supplied in the case of certain contracts.⁴

8. The Sale of Goods Act, 1893, § 4, requires that, in default of certain specified conditions, written evidence should be supplied in the case of contracts for the sale of goods worth £10 or upwards.⁵

The requirements of the Statute of Frauds and of the Sale of Goods Act are those which need special treatment, and with these I propose to deal.

III. THE STATUTE OF FRAUDS

1. *Provisions of the Fourth Section*

95. Terms of the Statute. [The Fourth Section of the Statute (29 Car. II, c. 3, § 4. — 1676) reads as follows:]

"No action shall be brought (1) *whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made in consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them;*"

a 9 Geo. IV, c. 14, § 1; 19 & 20 Vict. c. 97, § 13.

b 17 & 18 Vict. c. 31.

¹ See Stimson, Am. St. Law, § 8150.

² See Stimson, Am. St. Law, § 4147. Promise of discharged debtor. *Ibid.* § 4147. Promise to pay debt incurred during infancy. *Ibid.* § 4147. Representation as to character or credit. *Ibid.* § 4146.

³ See *post*, § 95. This is in force in the American states. See Stimson's Am. St. Law, § 4140. Other contracts required to be in writing may be found in Stimson, Am. St. Law, §§ 4146-48.

A statute requiring a writing or other formalities may be intended for the protection of one of the parties only (e.g., the Government), and in such case the failure to comply with the requirements of the statute will not prevent the enforcement of the contract against the other party. *U.S. v. New York, &c. S.S. Co.*, (1915) 239 U.S. 88.

⁴ See *post*, § 110.

⁵ Leases for less than three years were excepted by sections 1 and 2.

(5) or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."¹

As regards this section we have to consider three matters.

- (1) The nature of the contracts specified.
- (2) The form required.
- (3) The effect upon such contracts of a non-compliance with the provisions of the statute.

(1) *The nature of the contracts specified*

We will first note the characteristics of the five sorts of contracts specified in the section.

96. Special promise by an executor or administrator to answer damages out of his own estate. The liabilities of an executor or administrator in respect of the estate of a deceased

¹ In New York the corresponding provisions, with some additions, are as follows:

"No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized." N.Y. Rev. St. Pt. 2, ch. 6, tit. 5, § 1; Birdseye's Statutes (3d ed.), vol. i, p. 1407, § 172.

"A contract for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the *lessor or grantor*, or by his lawfully authorized agent." Real Property Law, § 224. "Nothing contained in this article abridges the powers of courts of equity to compel specific performance of agreements in cases of part performance." *Ibid.* § 234.

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

"1. By its terms is not to be performed within one year from the making thereof;

"2. Is a special promise to answer for the debt, default or miscarriage of another person;

"3. Is made in consideration of marriage, except mutual promises to marry;

"4. Is a conveyance or assignment of a trust in personal property;

"5. Is a subsequent or new promise to pay a debt discharged in bankruptcy." Personal Property Law, § 31, Consol. Laws, 1909.

See also N.Y. Code Civ. Proc. § 395 (requiring new promise to pay debt barred by Statute of Limitations to be in writing), and § 1942 (requiring release of one joint debtor without releasing the other to be in writing).

person are of two kinds. At common law he may sue and be sued upon obligations devolving upon him as representative of the deceased. In equity he may be compelled to carry out the directions of the deceased in respect of legacies, or to give effect to the rules of law relating to the division of the estate of an intestate. In neither case is he bound to pay anything out of his own pocket: his liabilities are limited by the assets of the deceased. But if, in order to save the credit of the deceased, or for any other reason, he choose to promise *to answer damages out of his own estate*, that promise must be in writing together with the consideration for it, and must be signed by him or his agent.¹ It is almost needless to add that in this, and in all other contracts under the section, the presence of writing will not atone for the absence of consideration.^a

97. Any promise to answer for the debt, default, or mis-carriage of another person. This is a promise of guarantee or suretyship. It is always reducible to this form: "Deal with X and if he does not pay you, I will."²

(a) *The promise differs from indemnity.* This promise is not an indemnity, or promise to save another harmless from the results of a transaction into which he enters at the instance of the promisor. The distinction is of great practical importance, because a contract of indemnity, unlike that of guarantee, does not require to be evidenced by writing of any sort.

In a contract of guarantee there must always be three parties in contemplation; a principal debtor (whose liability may be actual or prospective), a creditor, and a third party who in consideration of some act or promise on the part of the creditor, promises to discharge the debtor's liability, *if the debtor should fail to do so*.

The case of *Guild v. Conrad*^b affords a good illustration of a guarantee, and of an indemnity. The plaintiff at the request of the defendant accepted the bills of a firm of Demerara merchants, receiving a guarantee from the defendant that he would, if necessary, meet the bills at maturity. Later the firm got into difficulties, and the defendant promised the plaintiff that if he would accept their bills the funds should in any event be pro-

^a *Rann v. Hughes*, (1778) 7 T.R. 350 note.

^b [1894] 2 Q.B. 884.

¹ *McKeany v. Black*, (1897) 117 Cal. 587. But not where the promise is to pay money out of his own estate, not as damages for which the decedent's estate is liable, but to subserve some end of his own. *Bellows v. Sowles*, (1884) 57 Vt. 164; *Wales v. Stout*, (1889) 115 N.Y. 638.

² *Mallory v. Gillett*, (1860) 21 N.Y. 412.

vided. The first promise was a guarantee, the second an indemnity.¹

"In my opinion," said Davey, L.J., "there is a clear distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter into a contract of liability, indemnified against that liability independently of the question whether a third person makes default or not."²

There must, in fact, be an expectation that another "person" will pay the debt for which the promisor makes himself liable, and in the absence of such expectation the contract is not a contract of suretyship.³

X, the bailiff of a county court, was about to arrest a debtor. A promised to pay the debt if X would forbear to arrest the debtor. This was held to be a promise of indemnity from A to X, since the debtor was under no liability to X.⁴

(b) *There must be a primary liability of a third party.* There

^a Harburg India Rubber Comb. Co. v. Martin, [1902] 1 K.B. 778.

^b Reader v. Kingham, (1862) 13 C.B. (N.S.) 344.

¹ Jones v. Bacon, (1895) 145 N.Y. 446 (oral promise of defendant to indemnify indorser is not within the statute).

In Guild v. Conrad, *supra*, the difference between the two transactions was this: in the *first*, the defendant asked the plaintiff to become a *creditor* of the Demerara firm; in the *second* he asked the plaintiff to accept certain bills and thus become a *debtor* to the holders thereof.

² A promise to indemnify one who becomes bail or surety for another, is not within the statute. Anderson v. Spence, (1880) 72 Ind. 315; Ressester v. Waterman, (1894) 151 Ill. 169; Mills v. Brown, (1860) 11 Iowa, 314; Aldrich v. Ames, (1857) 9 Gray, (Mass.) 76; Boyer v. Soules, (1895) 105 Mich. 31; Fidelity &c. Co. v. Lawler, (1896), 64 Minn. 144; Jones v. Bacon, *supra*. But *contra* in a few states. May v. Williams, (1883) 61 Miss. 125; Nugent v. Wolfe, (1886) 111 Pa. 471; Hurt v. Ford, (1897) 142 Mo. 283; Kelsey v. Hibbs, (1862) 13 Oh. St. 340.

The terms "suretyship," "guaranty," and "indemnity" do not have a fixed and invariable meaning, as commonly used. The term "indemnity" is no doubt the broadest term, and often includes the other two. A promise of S whereby he agrees to indemnify C against loss by reason of his advancing credit to P is within the statute. It is a promise to a *creditor* to answer for the default of a third person who is his debtor. On the other hand, a promise by X to indemnify S against loss by reason of his becoming bound to C to pay the debt or answer for the default of P is not within the statute. It is a promise to a *debtor* or obligor. Such is the case of Guild v. Conrad. But such also is the case of Nugent v. Wolfe, *supra*, where the decision was *contra*.

³ A promise made to the debtor himself to pay a debt which the promisee owes to a third person is not within the statute. Eastwood v. Kenyon, (1840) 11 Adol. & E. 438; Clay Lumber Co. v. Coal Co., (1913) 174 Mich. 613; Meyer v. Hartman, (1874) 72 Ill. 442; Smart v. Smart, (1885) 97 N.Y. 559; Pike v. Brown, (1851, Mass.) 7 Cush. 133.

must be a liability, actual or prospective, of a third party for whom the promisor undertakes to answer. If the promisor makes himself primarily liable, the promise is not within the statute, and need not be in writing.

"If two come to a shop and one buys, and the other, to gain him credit, promises the seller '*If he does not pay you, I will,*' this is a collateral undertaking and void ^a without writing by the Statute of Frauds. But if he says, '*Let him have the goods, I will be your paymaster,*' or '*I will see you paid,*' this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act as but his servant."^b

(c) *Prospective liability.* The liability may be prospective at the time the promise is made, as a promise by A to X that if M employs X he (A) will go surety for payment of the services rendered:¹ yet there must be a principal debtor at some time: else there is no suretyship, and the promise, though not in writing, will nevertheless be actionable. Thus if X says to A, "If I am to do this work for M I must be assured of payment by some one," and A says, "Do it; I will see you paid," there is no suretyship, unless M should incur liability by giving an order: if he gives no order and the work is nevertheless done by X, A would be liable not as surety, but as principal debtor, by reason of his oral promise. ^{c 2}

(d) *Primary debt extinguished.* If there be an existing debt for which a third party is liable to the promisee, and if the promisor undertake to be answerable for it, still there is no guarantee if the terms of the arrangement are such as to effect an extinguishment of the original liability. If A says to X, "Give M a receipt in full for his debt to you, and I will pay the amount," this promise would not fall within the statute; for there is no suretyship, but a substitution of one debtor for

^a The word "void" is used incorrectly where "unenforceable" is meant.

^b Per Curiam in *Birkmyr v. Darnell*, (1704) 1 Sm. L.C. 200 (11th ed.).

^c *Mountstephen v. Lakeman*, (1874) L.R. 7 H.L. 17, and see L.R. 7 Q.B. 202.

¹ The liability may be prospective. *Davis v. Patrick*, (1891) 141 U.S. 479; *White v. Rintoul*, (1888) 108 N.Y. 222.

² *Merriman v. McManus*, (1883) 102 Pa. 102; *West v. O'Hara*, (1882) 55 Wis. 645; *Barrett v. McHugh*, (1880) 128 Mass. 165; *Cowdin v. Gottgetreu*, (1873) 55 N.Y. 650.

If the defendant undertakes for a person not himself liable to the promisee, there is no guaranty. *Mease v. Wagner*, (1821, S.C.) 1 McCord, 395; *Marion v. Faxon*, (1850) 20 Conn. 486; *Harlan v. Harlan*, (1897) 102 Iowa, 701. But a promise to guaranty a minor's debt is within the statute. *Dexter v. Blanchard*, (1865, Mass.) 11 Allen, 365; *Scott v. Bryan*, (1875) 73 N.C. 582.

another. The liability of the third party must be a continuing liability. ^{a 1}

(e) *Includes tort obligation.* The debt, default, or miscarriage spoken of in the statute will include liabilities arising out of wrong as well as out of contract. So in *Kirkham v. Marter*,^b *M* wrongfully rode the horse of *X* without his leave, and killed it. *A* promised to pay *X* a certain sum in consideration of his forbearing to sue *M*, and this was held a promise to answer for the miscarriage of another within the meaning of the statute.²

(f) *Confined to obligations enforceable at law.* It has been

^a *Goodman v. Chase*, (1818) 1 B. & Ald. 297.

^b (1819) 2 B. & Ald. 613.

¹ *Booth v. Eighmie*, (1875) 60 N.Y. 238; *Griffin v. Cunningham*, (1903) 183 Mass. 505.

Although the principal debt is not extinguished, the promise to pay it is original and not collateral when, for a new consideration moving to the promisor and beneficial to him, the promisor comes under an independent duty of payment, irrespective of the liability of the primary debtor. In such case the promise has been made, not to accommodate the debtor or benefit the creditor, but to subserve some substantial interest of the promisor. *Prime v. Koehler*, (1879) 77 N.Y. 91 (grantee of mortgaged premises promises to pay the mortgage if mortgagee will forbear to foreclose it); *Manning v. Anthony*, (1911) 208 Mass. 399 (same); *Raabe v. Squier*, (1895) 148 N.Y. 81 [owner of building promises to pay sub-contractor if he will continue to furnish material to contractor — but see *contra*, *Rand v. Mather*, (1853, Mass.) 11 Cush. 1]; *Clifford v. Luhring*, (1873) 69 Ill. 401 (same); *Bailey v. Marshall*, (1896) 174 Pa. 602 (a judgment-creditor promises to pay another creditor if latter will forbear to enter judgment or levy execution against a debtor); *Davis v. Patrick*, (1891) 141 U.S. 479. So also if property of the debtor is transferred to the promisor for the purpose of paying the debt. *First Nat. Bk. v. Chalmers*, (1895) 144 N.Y. 432. But if there is no such benefit to the promisor, the promise is within the statute. *Mallory v. Gillett*, (1860) 21 N.Y. 412; *White v. Rintoul*, (1888) 108 N.Y. 222.

In *Harburg I. R. Co. v. Martin*, [1902] 1 K.B. 778, it is said that to hold that the existence of a consideration beneficial to the promisor takes the promise out of the statute is a repeal of the statute. Nevertheless it is very common to hold, as in *Bailey v. Marshall*, *supra*, that "when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay, or discharge the debt of another, his promise is not within the statute." This appears to be the chief ground for holding that a promise of a *del credere* agent to make good any loss arising to the principal from sales or other contracts, is not within the statute. *Wolff v. Koppel*, (1843, N.Y.) 5 Hill, 458; *Swan v. Nesmith*, (1828, Mass.) 7 Pick. 220; *Davys v. Buswell*, [1913] 2 K.B. 47.

In these cases there is no fiduciary relation between the promisor and the other debtor, and the promisor is not a *surety*. Upon settlement by him with the creditor, he becomes an *assignee* of the creditor's rights, and he may make a profit over and above mere reimbursement. A true surety cannot do this.

² *Baker v. Morris*, (1885) 33 Kans. 580; *Jacobs v. Burgwyn*, (1868) 63 N.C. 196.

necessary in the case of this contract to point out that the words of the statute only apply to promises on which an action at law can be brought. It might be possible so to frame a guarantee, as between partners, that it could only be enforced by equitable remedies, and in such a case it does not fall within the statute.*

(g) *Consideration need not be expressed.* This contract is an exception to the general rule that "the agreement or some memorandum or note thereof," which the statute requires to be in writing, must contain the consideration as well as the promise: 19 & 20 Vict. c. 97, § 3.¹

98. *Agreement made in consideration of marriage.* The agreement here made is not the promise to marry² (the consideration for this is the promise of the other party), but the promise to make a payment of money or a settlement of property in consideration of, or conditional upon a marriage actually taking place.³

99. *Contract or sale of lands or hereditaments or any interest in or concerning them.* The rules which govern the forms of sale or conveyance of land are to be found elsewhere than in the Statute of Frauds, and are not a part of the law of contract. But the statute deals with agreements made in view of such sales, and it is not always easy to say what constitutes an interest in land. Contracts which are preliminary to the acquisition of an interest,^b or such as deal with a remote and inap-

* *Re Hoyle*, [1893] 1 Ch. at p. 97.*

^b *Boston v. Boston*, [1904] 1 K.B. 124.

* This case seems unsound and based upon a barren technicality. The promisees had a claim against the son. Hence, the promise was to a creditor to answer for the default of his debtor. The case illustrates the strong tendency of the courts to narrow the operation of the statute.

¹ See *Browne*, Statute of Frauds, §§ 390, 391.

² *Short v. Stotts*, (1877) 58 Ind. 29; *Blackburn v. Mann*, (1877) 85 Ill. 222. But if the promise to marry is by its terms not to be performed within one year it is unenforceable. *Derby v. Phelps*, (1822) 2 N.H. 515; *Paris v. Strong*, (1875) 51 Ind. 339; *Barge v. Haslam*, (1901) 63 Neb. 296; *Lawrence v. Cooke*, (1868) 56 Me. 187. *Contra*: *Brick v. Gunnar*, (1885, N.Y.) 36 Hun, 52; *Lewis v. Tapman*, (1900) 90 Md. 294.

³ *Hunt v. Hunt*, (1902) 171 N.Y. 396; *White v. Bigelow*, (1891) 154 Mass. 593; *Richardson v. Richardson*, (1893) 148 Ill. 563; *Lloyd v. Fulton*, (1875) 91 U.S. 479; *Dienst v. Dienst*, (1913) 175 Mich. 724; cf. *Nowack v. Berger*, (1896, Mo.) 34 S.W. 489.

A mutual engagement to marry is within the statute if by its terms it is not to be performed within one year. *Derby v. Phelps*, (1822) 2 N.H. 515; *Nichols v. Weaver*, (1871) 7 Kan. 373; *Ullman v. Meyer*, (1882) 10 Fed. 241. *Contra*: *Lewis v. Tapman*, (1900) 90 Md. 294; *Blackburn v. Mann*, (1877) 85 Ill. 222.

preciable interest, are outside the section. Such would be an agreement to pay for an investigation of title; to put a house into repair for a prospective tenant;^a or to transfer shares in a railway company which, though it possesses land, gives no appreciable interest in the land to its shareholders.¹

But the chief difficulties which have arisen in interpreting this section are with reference to the sale of crops.

A distinction has been drawn as to these between what are called emblements, crops produced by cultivation, or *fructus industriales*, and growing grass, timber, or fruit upon trees, which are called *fructus naturales*. The law is now settled thus. If the property is to pass *after* the crops are severed from the soil then both *fructus naturales* and *fructus industriales* are goods within the meaning of the 4th section of the Sale of Goods Act.^b If the property is to pass *before* severance *fructus industriales* are goods,^c but *fructus naturales* are an interest in land.^d

100. Agreement not to be performed within the space of one year from the making thereof. Two distinctions should be noted with regard to this form of agreement.

^a *Angell v. Duke*, (1875) L.R. 10 Q.B. 174.

^b 56 & 57 Vict. c. 71, § 62.

¹ *Heyn v. Philips*, (1869) 37 Cal. 529. A partnership to deal in lands is not within the statute. *Babcock v. Read*, (1885) 99 N.Y. 609; *Howell v. Kelly*, (1892) 149 Pa. 473; *Wetherbee v. Potter*, (1868) 99 Mass. 354. But see *contra*, *Smith v. Putnam*, (1900) 107 Wis. 155.

² (The 17th Section of the Statute of Frauds.) *Killmore v. Howlett*, (1872) 48 N.Y. 569 (trees to be cut by vendor and delivered as cord wood). So also as to fixtures to be severed by the vendor. *Long v. White*, (1884) 42 Ohio St. 59. A contract for the sale of a standing building is within the statute if it purports to pass title before severance. *Lavery v. Pursell*, (1888) 39 Ch. D. 508; but it is not within the statute if it purports to provide for the passing of title after severance. *Long v. White*, *supra*; *Wetkopsky v. N.H. Gas Co.* (1913) 88 Conn. 1. As to the sale of tenant's fixtures, see *Williston, Sales*, § 65.

³ Crops planted annually are treated as personalty. *Northern v. State*, (1848) 1 Ind. 113; *Whitmarsh v. Walker*, (1840, Mass.) 1 Met. 313; *Purner v. Piercy*, (1874) 40 Md. 212.

⁴ Sales of growing trees are within the fourth section of the statute. *Hirth v. Graham*, (1893) 50 Oh. St. 57, and cases there cited pro and con. *Marshall v. Green*, (1875) 1 C.P.D. 35, holds that a contract for the sale of standing trees to be cut by the buyer and removed in a short period is not a contract for the sale of an interest in land. This seems to hold that the test is the intention of the parties and not the physical character of the thing sold or its status in the law of property. It was held, on the other hand, in *Lavery v. Pursell*, (1888) 39 Ch. D. 508, that a sale of a house to be severed and removed by the buyer within sixty days was within the statute. See *Williston, Sales*, §§ 61-67, Bennett, "Sales of Standing Trees," 8 *Harvard Law Review*, 367.

(a) If the contract is for an indefinite time but can be determined by either party with reasonable notice within the year the statute does not apply. A contract to pay a weekly sum for the maintenance of a child, or of a wife separated from her husband, has been held on this ground to be outside the section.^a

This is what is meant by the *dictum* that to bring a contract within the operation of the statute it must "appear by the whole tenor of the agreement that it is to be performed after the year." If the contract is for a definite period, extending beyond the year, then, though it might be concluded by notice within the year, on either side, the statute operates.^{b 1}

(b) If all that one of the parties undertakes to do is intended to be done, and is done, within the year, the statute does not apply. A was tenant to X, under a lease for twenty years. He promised verbally to pay an additional £5 a year for the remainder of the term in consideration that X laid out £50

^a *McGregor v. McGregor*, (1888) 21 Q.B.D. 429.

^b *Hanau v. Ehrlich*, [1911] 2 K.B. 1056, [1912] App. Cas. 39.

¹ A contract is not within this clause of the statute unless its terms are so drawn that it cannot by any possibility be performed fully within one year. It is not within the statute merely because it later turns out that it is not performed within one year. *Peter v. Compton*, (1693) *Skinner*, 353 (promise to pay after the plaintiff should marry); *Warner v. Texas & Pac. R. Co.*, (1896) 164 U.S. 418 (promise to maintain a railway switch as long as plaintiff should need it. Many other cases are cited). Contracts which inherently or by their terms depend for their continuance upon a life, are not within the statute. *Peters v. Westborough*, (1837, Mass.) 19 Pick. 364; *Harper v. Harper*, (1877) 57 Ind. 547; *Carr v. McCarthy*, (1888) 70 Mich. 258. Nor contracts to be performed at the death of a person. *Kent v. Kent*, (1875) 62 N.Y. 560; *Riddle v. Backus*, (1874) 38 Iowa, 81. But an affirmative contract that is by its terms to last beyond a year is not taken out of the statute by the fact that it may become impossible of performance before the end of a year, as a contract for personal service that would terminate earlier by the death of the servant. *Hill v. Hooper*, (1854, Mass.) 1 Gray, 131; *Wahl v. Barnum*, (1889) 116 N.Y. 87 (partnership). An express reservation of an option to terminate within a year has been held to take the contract out of the statute. *Blake v. Voight*, (1892) 134 N.Y. 69.

It has been held that a contract made on March 31 for exactly a year's service to begin on April 1 is within the statute. *Billington v. Cahill*, (1889) 51 Hun, 132. *Contra*, *Smith v. Gold Coast Co.*, [1903] 1 K.B. 285. See also *Odell v. Webendorfer*, (1900) 50 App. Div., (N.Y.) 579.

A contract is not taken out of the statute by the fact that the parties may rescind it within a year. *Wagniere v. Dunnell*, (1909) 29 R.I. 580; 17 Ann. Cas. 205, and note.

A negative contract, to forbear for a period of years, has been regarded as one that is *fully performed* upon the death of the promisor, and hence not within the statute. *Doyle v. Dixon*, (1867) 97 Mass. 208.

in alterations. ^a X did this and A was held liable on his promise.^{a 1}

But if the undertaking of one of the parties cannot be performed, while that of the other might be, but is not intended to be performed within the year, the contract falls under the section.^b

(2) *The form required*

101. Requirements of form. The form required is the next point to be considered. What is meant by the requirement that "the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized" ?

We may, with regard to this part of the subject, lay down the following rules.^c

102. The form is merely evidentiary. The form required does not go to the existence of the contract. The contract exists though it may not be clothed with the necessary form, and the effect of a non-compliance with the provisions of the statute is simply that no action can be brought until the omission is made good.

It is not difficult to illustrate this proposition. Thus the note in writing may be made so as to satisfy the statute, at any time between the formation of the contract and the commencement of an action:² or the signature of the party charged may be affixed before the conclusion of the contract.

Again one party to the contract may sign a rough draft of

^a *Donellan v. Read*, (1832) 3 B. & A. 899.

^b *Reeve v. Jennings*, [1910] 2 K.B. 522.

^c With the exception of rule (§ 105), what is said under this head may be taken to apply to the 4th section of the Sale of Goods Act [17th section of Statute of Frauds] as well as to the 4th section of the Statute of Frauds.

¹ This is a much disputed question in the United States. Some cases follow *Donellan v. Read* cited by the author: *Fraser v. Gates*, (1886) 118 Ill. 99; *Piper v. Fosher*, (1889) 121 Ind. 407; *Smalley v. Greene*, (1879) 52 Iowa, 241; *Bless v. Jenkins*, (1895) 129 Mo. 647; *Grace v. Lynch*, (1891) 80 Wis. 166. Others hold that such a case is within the statute when either promise is not to be performed within a year. *Marcy v. Marcy*, (1864, Mass.) 9 Allen, 8; *Dietrich v. Hoefelmeir*, (1901) 128 Mich. 145; *Reinheimer v. Carter*, (1877) 31 Oh. St. 579.

² *Bird v. Munroe*, (1877) 66 Me. 337; *Walker v. Walker*, (1900, Ky.) 55 S.W. 726; *McAnnulty v. McAnnulty*, (1887) 120 Ill. 26. The weight of authority seems to be that a memorandum that was not in existence prior to the bringing of the action is not sufficient to sustain that action. *Bailey v. Sweeting*, (1861) 9 C.B. (N.S.) 843 (per Williams, J.); *Lucas v. Dixon*, (1889) 22 Q.B.D. 357; *Williston, Sales*, § 117; *Tisdale v. Harris*, (1838, Mass.) 20 Pick. 9 (*semble*); *Bird v. Munroe*, *supra*. *Contra*, *Cash v. Clark*, (1895) 61 Mo. App. 636.

its terms, and acknowledge his signature by way of concluding the contract when the draft has been corrected.^a

And an offer containing the names of the parties and the terms of an offer signed by the offeror will bind him, though the contract is concluded by a subsequent parol acceptance.^b In the first of these cases the signature of the party charged — in the second not the signature only but the entire memorandum — was made before the contract was concluded. It may even happen that one of the parties to a contract which he has not signed may acknowledge it in a letter which supplies his signature and contains at the same time an announcement of his intention to repudiate the contract. He has then supplied the statutory evidence, and, as the contract has already been made, his repudiation is nugatory.^c

103. **The parties and subject-matter must appear.** The parties and the subject-matter of the contract must appear in the memorandum.

The parties must be named, or so described as to be identified with ease and certainty. A letter beginning "Sir," signed by the party charged but not containing the name of the person to whom it is addressed, has more than once been held insufficient to satisfy the statute.^d

But, if the letter can be shown to have been contained in an envelope on which the name appears, the two papers will be regarded as one document, and the statute is satisfied.^e

Where one of the parties is not named, but is described, parol evidence will be admitted for the purpose of identification if the description points to a specific person, but not otherwise. If *A* contracts with *X* in his own name, being really agent for *M*, *X* or *M* may show that *M* was described in the memorandum in the character of *A*.^f

^a *Stewart v. Eddowes*, (1874) L.R. 9 C.P. 311.

^b *Reuss v. Pickaley*, (1866) L.R. 1 Exch. 342.

^c *Buxton v. Rust*, (1872) L.R. 7 Exch. 1 & 279.

^d *Williams v. Lake*, (1859) 2 E. & E. 349; *Williams v. Jordan*, (1877) 6 Ch. D. 517.

^e *Pearce v. Gardner*, (1897) 1 Q.B. 688.

^f See *Commins v. Scott*, (1875) L.R. 20 Eq. 15, 16; *Trueman v. Loder*, (1840) 11 A. & E. 589.

¹ *Mason v. Decker*, (1878) 72 N.Y. 595; *Lydig v. Braman*, (1900) 177 Mass. 212; *Gradle v. Warner*, (1892) 140 Ill. 123; *Austrian & Co. v. Springer*, (1892) 94 Mich. 343.

² *Drury v. Young*, (1882) 58 Md. 546; *Louisville &c. Co. v. Lorick*, (1888) 29 S.C. 533; *Bailey v. Sweeting*, *supra*.

³ *Grafton v. Cummings*, (1878) 99 U.S. 100; *Ments v. Newwitter*, (1890) 122 N.Y. 491. But the letter addressed to a third party is sufficient if it contains the required names and terms. *Peabody v. Speyers*, (1874) 56 N.Y. 230; *Spangler v. Danforth*, (1872) 65 Ill. 152.

⁴ *Huffcut*, Agency, § 123.

If property is sold by an agent on behalf of the *owner* or *proprietor* it may be proved by parol that *X* was the owner or proprietor; if the sale was made by the agent on behalf of the *vendor*, of his *client*, or his *friend*, there would be no such certainty of statement as would render parol evidence admissible.^a

The same principle is applied to descriptions of the subject-matter of a contract.

Where *X* agreed to sell and *A* to buy "24 acres of land freehold and all appurtenances thereto at Totmanslow in the parish of Draycott in the County of Stafford" parol evidence was admitted to identify the land.^b But a receipt for money paid by *A* to *X* "on account of his share in the Tividale mine" was held to be too uncertain as to the respective rights and liabilities of the parties, to be identified by parol evidence.^c ¹

104. The terms may be collected from various documents. The memorandum may consist of various letters and papers, but they must be connected and complete.²

The statute requires that the terms, and all the terms of the contract, should be in writing, but these terms need not appear in the same document: a memorandum may be proved from several papers or from a correspondence, but the connection must appear from the papers themselves.

Parol evidence is admissible to connect two documents where each obviously refers to another, and where the two when thus connected make a contract without further explanation. This is the principle laid down in *Long v. Miller*,^d and adopted in more recent cases.³ It is not inconsistent with the decision in the often-cited case of *Boydell v. Drummond*.^e

^a *Reesiter v. Miller*, (1878) 3 App. Cas. 1141; *Potter v. Duffield*, (1874) 18 Eq. 4.

^b *Plant v. Bourns*, [1897] 2 Ch. (C.A.) 281.

^c *Caddick v. Skidmore*, (1857) 2 De G. & J. 52.

^d (1879) 4 C.P.D. 454.

^e (1800) 11 East, 142.

¹ *Doherty v. Hill*, (1887) 144 Mass. 465; *Ryan v. United States*, (1889) 136 U.S. 68; *Fortescue v. Crawford*, (1890) 105 N.C. 29. But the description is sufficient if the property and the interest in it are capable of unambiguous identification. *Ryder v. Loomis*, (1894) 161 Mass. 161 (my right in my father's estate); as to the power of equity to supply deficiencies in the description see L.R.A. 1917 A, 563-603.

² *O'Donnell v. Leeman*, (1857) 43 Me. 158; *Tice v. Freeman*, (1883) 30 Minn. 389; *Thayer v. Luce*, (1871) 22 Ohio St. 62; *Bayne v. Wiggins*, (1891) 139 U.S. 210; *Brewer v. Horst and Lachmund Co.*, (1900) 127 Cal. 643; *Lerned v. Wannemacher*, (1864, Mass.) 9 Allen, 412; *Gibson v. Holland*, (1865) L.R. 1 C.P. 1.

³ *Beckwith v. Talbot*, (1877) 95 U.S. 289; *Lee v. Butler*, (1897) 167 Mass. 426.

There two forms of prospectus were issued by the plaintiff, inviting subscriptions to an illustrated edition of Shakespeare. Subscribers might purchase the prints only, or the work in its entirety. The defendant entered his name in a book in the plaintiff's shop, entitled "Shakespeare Subscribers, their signatures;" afterwards he refused to carry out his purchase; and it was held that the subscription book and the prospectus were not connected by documentary evidence, and that parol evidence was not admissible to connect them. But though the rule as to the admission of parol evidence has been undoubtedly relaxed since 1809, it seems that *Boydell v. Drummond* would not now be decided differently, for the evidence sought to be introduced went further than the mere connection of two documents, and seems to have dealt with the nature and extent of the defendant's liability.

Again, the terms must be complete in the writing. Where a contract does not fall within the statute, the parties may either (1) put their contract into writing, (2) contract only by parol, or (3) put some of the terms in writing and arrange others by parol. In the last case, although that which is written may not be varied by parol evidence, yet the terms arranged by parol are proved by parol, and they then supplement the writing, and so form one entire contract. But where a contract falls within the statute, all its terms must be in writing, and the offer of parol evidence of terms not appearing in the writing would at once show that the contract was something other than that which appeared in the written memorandum.^{a 1}

105. **Whether consideration must appear.** The consideration must appear in writing as well as the terms of the promise sued upon. This rule has been settled since the year 1804.^{b 2} It is not wholly applicable to the sale of goods,³ and is subject to an exception, created for reasons of commercial convenience

^a *Greaves v. Ashlin*, (1813) 3 Camp. 426.

^b *Wain v. Warlters*, (1804) 5 East, 10.

¹ *O'Donnell v. Leeman*, *supra*; *Drake v. Seaman*, (1884) 97 N.Y. 230.

² This was based upon the term "agreement" in the fourth section, which was held to require a statement of the consideration. The American courts have differed, but so far as the consideration is executory it must be stated in the writing. *Drake v. Seaman*, (1884) 97 N.Y. 230. In some states the matter is settled by an express statutory requirement. *Browne, Statute of Frauds*, §§ 390-91; *Stimson, Am. St. Law*, § 4142.

³ The term "bargain" in the 17th section is construed to include the price only when a price has been agreed upon. *Browne, Statute of Frauds*, §§ 376-79.

by the Mercantile Law Amendment Act, 1856, in the case of the "promise to answer for the debt, default or miscarriage of another": such a promise shall not be

"deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." (19 & 20 Vict. c. 97, § 3.)¹

106. **Signature of party or agent.** The memorandum must be signed by the party charged² or his agent.³

The contract therefore need not be enforceable at the suit of both parties; it may be optional to the party who has not signed to enforce it against the party who has.⁴ The signature need not be an actual subscription of the party's name, it may be a mark; nor need it be in writing, it may be printed or stamped; nor need it be placed at the end of the document, it may be at the beginning or in the middle.⁵

But it must be intended to be a signature, and as such to be a recognition of the contract, and it must govern the entire contract.⁶

These rules are established by a number of cases turning upon difficult questions of evidence and construction. The principal cases are elaborately set forth in Benjamin on Sales,⁷ but a further discussion of them would here be out of place.

^a See Benjamin on Sales, pp. 231-34 (4th ed.).

^b Huckleby v. Hook, (1900) 82 L.T. 117.

^c 5th ed., chap. VI.

¹ Some American statutes provide that the consideration must appear in a guaranty, and some provide that it need not appear. Stimson, Am. St. Law, §§ 4140-42; 29 Am. & Eng. Encyc. of Law (2d ed.), pp. 868-72.

² In New York by party to be charged in all cases except the sale or leasing of lands, and in that case by the grantor or lessor. See § 95, note 2, *ante*.

³ The agent may be appointed by parol, unless, as in some states, the statute specifies otherwise. An agent may act for both parties, but one party cannot be agent for the other. O'Donnell v. Leeman, (1857) 43 Me. 158; Johnson v. Dodge, (1856) 17 Ill. 433; Browne, Statute of Frauds, §§ 367-70; Wright v. Dannah, (1809) 2 Camp. 203.

⁴ Justice v. Lang, (1873) 42 N.Y. 493, 52 N.Y. 323; Bowers v. Whitney, (1902) 88 Minn. 168; cf. Adams v. Hotel Co., (1908) 154 Mich. 198; Kerr v. Finch, (1913) 25 Idaho, 32.

⁵ Evans v. Hoare, [1892] 1 Q.B. 593; Clason v. Bailey, (1817, N.Y.) 14 Johns. 484; Salmon Falls Mfg. Co. v. Goddard, (1852, U.S.) 14 How. 446; Sanborn v. Flagler, (1864, Mass.) 9 Allen, 474. But if the statute reads "subscribed" instead of "signed," the signature must be at the end of the memorandum. James v. Patten, (1852) 6 N.Y. 9. See L.R.A. 1917 A, 151.

(3) *Effect of non-compliance with statute*

107. **Statute does not avoid contract.** It remains to consider what is the position of parties who have entered into a contract specified in § 4, but have not complied with the provisions of the section. Such a contract is neither void nor voidable, but it cannot be enforced by action because it is incapable of proof.¹

It has been shown that a memorandum in the requisite form, whether made before or after the fact of agreement, will satisfy the requirements of the statute.² But the nature of the disability attaching to parties who have not satisfied these requirements may be illustrated by cases in which they have actually come into court without supplying the missing form.

108. **Contract cannot be proved.** In the case of *Leroux v. Brown*,^a the plaintiff sued upon a contract not to be performed within the year, made in France and not reduced to writing. French law does not require writing in such a case, and by the rules of private international law the validity of a contract, so far as regards its formation, is determined by the *lex loci contractus*, the law of the place where it is made.

The mode of proof of the contract, however, (as being a matter of procedure), is governed by the *lex fori*, the law of the place where the action is brought. If, therefore, the 4th section avoided contracts made in breach of it, the plaintiff could have recovered, for his contract was good in France where it was made, and the *lex loci contractus* would have been applicable. If, on the other hand, the 4th section affected the mode of proof only, the contract, though not void, was incapable of proof in England, because the necessary evidence was wanting.

Leroux tried to show that his contract was void by English law. He would then have succeeded, for he could have proved,

^a (1852) 12 C.B. 801.

¹ The statute does not affect fully executed contracts. *Brown v. Farmers' &c. Co.*, (1889) 117 N.Y. 266; *Stone v. Dennison*, (1832, Mass.) 13 Pick. 1. As to contracts executed on one side, see § 100, note 1, p. 102, *ante*. If one party has conferred a benefit by performance such as would have raised an implied promise to compensate, he may recover in *quantum meruit*. *McDonald v. Crosby*, (1901) 192 Ill. 283; *Wallace v. Long*, (1885) 105 Ind. 522; *Spinney v. Hill*, (1900) 81 Minn. 316. See Woodward, *Quasi-Contracts*. The statute must be pleaded in order to be available as a defense. *Browne*, *Statute of Frauds*, § 508 *et seq.* *Matthews v. Matthews*, (1897) 154 N.Y. 288. But see *Dunphy v. Ryan*, (1886) 116 U.S. 491.

² See § 102, *ante*.

first, his contract, and then the French law which made it valid. But the court held that the 4th section dealt only with matters of proof, and did not avoid his contract, but only made it incapable of proof, unless he could produce a memorandum of it. This he could not do, and so lost his suit.¹

109. **Doctrine of part performance in equity.** The rule is further illustrated by the mode in which equity has dealt with such contracts.² The history of the matter needs attention.

In suits for obtaining specific performance, equity would admit parol evidence to show that a contract had been made (even though it was one of a kind required to be in writing by the statute of frauds), where one of the parties had so acted on the faith of promises made by the other, as to render it unfair that both should not be bound.³

When the Judicature Act enabled all the divisions of the High Court to recognize and administer equitable rights and remedies, then the reason of the rule and its limitation to this form of remedy were at first overlooked, and so in *Britain v. Rossiter*^a an action was brought for wrongful dismissal, in

^a (1879) 11 Q.B.D. 123.

¹ The statute affects only the remedy and not the validity of the contract. *Townsend v. Hargraves*, (1875) 118 Mass. 325; *Bird v. Munroe*, (1877) 66 Me. 337; *Buhl v. Stephens*, (1898) 84 Fed. 922. Cf. *Miller v. Wilson*, (1893) 146 Ill. 523.

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." *Scudder v. Union Nat. Bk.*, (1875) 91 U.S. 406.

² The doctrine has no application to an action at law, and is invoked only in equity. It is a species of judicial legislation, but is now recognised in the statutes of some states. See N.Y. Real Property Law, § 234. It is not adopted in Kentucky, Mississippi, North Carolina, and Tennessee.

³ The doctrine is said to be based on the fraud of the defendant in inducing the plaintiff to make some irretrievable change of situation relying upon the promise, and then refusing to perform. *Browne, Statute of Frauds*, §§ 437-40, 448. If the plaintiff can be put in *statu quo* without enforcing the contract specifically, a case for avoiding the statute is not presented. Hence mere payment of the purchase money is not enough, since it may be recovered in an action at law. *Browne*, § 461. In most jurisdictions, taking possession of lands, whether with or without payment of purchase money, is a sufficient part performance. *Browne*, §§ 465-86. But some states seem to require something more in order to establish such an irretrievable change of situation as will enable an equity court to disregard the statute, — as improvements or other acts that cannot be in any way compensated. *Burns v. Daggett*, (1886) 141 Mass. 368; *Miller v. Ball*, (1876) 64 N.Y. 286.

breach of a verbal contract of service not to be performed within the year. The contract had been performed in part and the rule of equity was invoked to dispense with the need of writing. The contract was one to which the remedy by specific performance was inapplicable: the doctrine of part performance would therefore have been equally inapplicable. The court held, however, that the rule of equity was limited to contracts relating to an interest in land.

This limitation of the doctrine is not wholly consistent with earlier authorities. Probably the true rule is laid down by Kay, J., in *McManus v. Cooke*,^a after a careful examination of the cases bearing on the subject.

"It is probably more accurate to say that the doctrine of part performance applies to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing."

And, conversely, it has since been held that in cases where equity would not have granted specific performance, such as a contract to enter into a partnership, the doctrine has no application.^b

The Judicature Act, therefore, has not extended the remedy, but only the jurisdiction through which the remedy may be obtained, and as the chancery could not have given damages in lieu of specific performance before the Act, so damages cannot be obtained where parol evidence is admitted as above described.^{c 1}

For a review of the acts which have been held to constitute part performance, the reader must be referred to Sir Edward Fry's book on Specific Performance (ed. 5), pp. 291-313. But it must constantly be borne in mind that "the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as is alleged,"^d and they must be acts done by the person seeking to enforce the contract and not by the person against whom it is sought to be enforced. They must, in other words, be acts which are only to be explained on the footing of the contract alleged by the

^a (1887) 35 Ch. D. 681, 697.

^b *Turner v. Melladew*, (1908) 19 T.L.R. 273.

^c *Lavery v. Pursell*, (1888) 39 Ch. D. 508, 519.

^d Lord Selborne, C., in *Maddison v. Alderson*, (1883) 8 App. Cas. 479.

¹ The same problem arises in connection with the many American statutes similar to the Judicature Act.

plaintiff.^a Taking possession of the land, giving notice to tenants already in possession, are examples of such acts.

In *Maddison v. Alderson*^b a promise of a gift of land was made to the plaintiff in consideration that she remained in the service of the promisor during his lifetime. She did so; but the House of Lords,^c affirming the judgment of the Court of Appeal, held that the service so rendered was not exclusively referable to the promised gift. It might have been given for other reasons, and so was not such part performance as admitted parol evidence of the promise.^{d 1}

2. Provisions of the Seventeenth Section

110. Terms of the Statute. [The Seventeenth Section of the Statute reads as follows:

No contract for the sale of any goods, wares or merchandises for the price [or value] of ten pounds sterling, or upwards, shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold and actually receive the same, (2) or give something in earnest to bind the bargain or in part payment, (3) or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.]²

^a *Daniels v. Trefusis*, [1914] 1 Ch. 788.

^b 7 Q.B.D. 174.

^c 8 App. Cas. 467.

^d Cf. *Dickinson v. Barrow*, [1904] 2 Ch. 339.

¹ Some American cases hold the rendering of services not a sufficient part performance. *Russell v. Briggs*, (1901) 165 N.Y. 500; *Johns v. Johns*, (1879) 67 Ind. 440; *Crabill v. Marsh*, (1882) 38 Ohio St. 331; *Kessler's Estate*, (1894) 87 Wis. 660. But others hold such services a sufficient part performance. *Vreeland v. Vreeland*, (1895) 53 N.J. Eq. 387; *Lloyd v. Hollenback*, (1893) 98 Mich. 203; *Warren v. Warren*, (1883) 105 Ill. 568; *Svanburg v. Fosseen*, (1899) 75 Minn. 350. See as to virtual adoption of child on an oral promise to convey land to it, *Shahan v. Swan*, (1891) 48 Ohio St. 25 (not enforceable). *Kofka v. Rosicky*, (1894) 41 Neb. 328 (enforceable). Cf. *Mahaney v. Carr*, (1903) 175 N.Y. 454. Marriage cannot be treated as part performance because it is expressly excluded by the statute. *Hunt v. Hunt*, (1902) 171 N.Y. 396.

² The original English statute is inserted in the text as more useful to American students than the provisions of the later English Sale of Goods Act.

This section has been re-enacted with some variations in all the American jurisdictions except Alabama, Arizona, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and West Virginia.

The price is fixed at \$30 in Arkansas, Maine, Missouri, and New Jersey; at \$33 in New Hampshire; at \$40 in Vermont; at \$200 in California, Idaho, Montana, and Utah; at any price however small in Florida and Iowa; and at \$50 in the other jurisdictions in which this section is in force.

The Commissioners on Uniform State Laws have recommended a uniform Sale of Goods Act for the American states. This has been adopted in Arizona, Connecticut, Massachusetts, New Jersey, New York, Ohio, Rhode

III. Provisions of Sale of Goods Act. [The provisions of the Sale of Goods Act (56 & 57 Vict. c. 71, § 4) are as follows:]

(1) A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.^a

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.^b

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.¹

^a This sub-section contains the substance of § 17, now repealed, of the Statute of Frauds. The language is altered so as to leave no doubt that the effect of this section, both as to form required and the effect of its absence, is identical with that of § 4 of the Statute of Frauds.

^b This sub-section embodies the section, now repealed, of Lord Tenterden's Act, which settled the doubt as to the operation of the 17th section of the Statute of Frauds upon an agreement to sell.

Island, and some other states. The provisions in this act that correspond to § 17 of the original Statute of Frauds, as adopted in New York (Laws of 1911, chap. 571, § 85), are as follows:

1. A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

¹ As to whether the subject-matter of the sale is personalty, and so within this section allowing one of three alternative methods of satisfying the statute and requiring that only if the article be above a certain value, or whether it is realty, and so within the "Fourth Section" requiring a writing, however small the value, has been discussed. See *ante*, § 99; *Hirth v. Graham*, (1893) 50 Ohio St. 57; *Higgins v. Kusterer*, (1879) 41 Mich. 318; *Northern v. Lathrop*, (1848) 1 Ind. 113.

We have here to consider, as in the case of the 4th section of the Statute of Frauds —

- (1) The nature of the contract.
- (2) The form required.
- (3) The effect of non-compliance with these requirements.

(1) *Nature of the contract*

112. Contract of sale under English Sale of Goods Act. The statute¹ deals with the sale of goods, and goods are defined therein as “chattels personal other than things in action and money”;² but the words “contract of sale” include two sorts of agreement — a *sale* and an *agreement to sell*, and the 4th section deals with both. The essential difference appears in an earlier section of the Act.

“Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a *sale*; but where the transfer of the property in the goods is to take place at some future time, or subject to some condition thereafter to be fulfilled, the contract is called ‘an agreement to sell.’”^a

The contract for the sale of goods may therefore contemplate an instantaneous, or a future or conditional transfer of property in the goods; and a subsequent section of the Act supplies us with the tests which determine whether a contract is a *sale* or an *agreement to sell*.

113. Sale and agreement to sell. To constitute a *sale* the goods sold must be *specific*, they must be *in a deliverable state*, and the sale must be *unconditional*.

If A orders any ten sheep out of X’s flock the goods are not specific. If he orders a table which he sees in course of making in X’s shop the goods are incomplete. If he buys X’s stack of hay at so much a ton, the price to be ascertained when the hay is taken down and weighed, there is yet something to be done to fix the price.

Where the conditions of a sale are satisfied the contract

^a 56 & 57 Vict. c. 71, § 1, sub-a. 3.

¹ That is, the English “Sale of Goods Act.”

² In the United States the statute of frauds governing the sale of personal property is generally held to cover the sale of choses in action, and especially those in the nature of securities evidenced in some material form. *Greenwood v. Law*, (1892) 55 N.J. L. 168. But not a sale of an interest in an invention before a patent is obtained. *Somerby v. Buntin*, (1875) 118 Mass. 279. Cf. *Jones v. Reynolds*, (1890) 120 N.Y. 213; *Walker v. Supple*, (1875) 54 Ga. 178.

operates as a *conveyance*. When, and so soon as, the parties are agreed the property in the goods passes to the buyer: he has the remedies of an owner in respect of the goods themselves besides an action *ex contractu* against the seller if the latter fail to carry out his bargain, or part with the goods to a third party: the goods stand at his risk; if they are destroyed the loss falls on him and not on the seller.

It is further important to bear in mind, not only that the difference between a sale and an agreement to sell is the difference between conveyance and contract, but that an agreement to sell may become a sale on the fulfillment of the conditions on which the property in the goods is to pass to the buyer.

As a rule there is no great difficulty in determining whether, as a fact, these conditions have been fulfilled. But questions sometimes arise which admit of some doubt, in cases where there is an agreement for the purchase of goods which are not specific, and the seller has to *appropriate the goods to the contract*. Upon such appropriation the contract becomes a *sale*: it is therefore desirable to ascertain the precise moment at which property and risk pass to the buyer.

If the buyer selects the goods to be appropriated, if he approves the selection made by the seller, or if the goods are delivered to a carrier on the authority of the buyer, the appropriation takes place at the moment of approval, or of delivery. If however the seller has selected the goods on the authority of the buyer, but without his express approval, doubts may arise whether his selection is irrevocably binding upon him or whether it merely expresses an intention which he may alter. The question is one which I will not discuss here; it is a part of the subject of the special contract of sale.^{a 1}

114. Sale or work and labor. A different sort of question has arisen in cases where skilled labor has been expended on the thing sold in pursuance of the contract, and before the property is transferred. It has been asked whether the contract is a contract of sale or for the hire of services. The law may be taken

^a Chalmers, *Sale of Goods Act* (7th ed.), p. 68 *et seq.*

¹ The operative facts necessary to pass title to a chattel at common law are not the same as those necessary to satisfy the requirements of the *Sale of Goods Act* or of § 17 of the *Statute of Frauds*. The statute may be satisfied without passing title at all, and the statute is not necessarily satisfied even though enough has been done to satisfy the common-law requirements for passing title. It is only the *Statute of Frauds* with which we are concerned here.

to be now settled, that, whatever the respective values of the labor and the material, if the parties contemplate the ultimate delivery of a chattel the contract is for the sale of goods.¹

"I do not think," said Blackburn, J., "that the test to apply in these cases is whether the value of the work exceeds that of the materials used in its execution; for if a sculptor was employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would in my opinion be nevertheless for the sale of a chattel."²

(2) *The form required*

115. Three methods of satisfying statute. As to the form, it is enough to say that where, in absence of a part acceptance and receipt³ or part payment,⁴ a note or memorandum in writ-

¹ *Lee v. Griffin*, (1861) 1 B. & S. 272.

² In the United States the simple test established by the English court in *Lee v. Griffin*, and embodied in the Sale of Goods Act, has not generally been adopted. It prevails, perhaps in one or two states. *Brown v. Sanborn*, (1875) 21 Minn. 402; *Hardell v. McClure*, (1849, Wis.) 1 Chndl. 271; *Burrell v. Highleyman*, (1888) 33 Mo. App. 183. Two opposing views divide generally the American decisions. (1) The New York rule, as established by court decisions, was that if the article is in existence as a subject-matter of sale at the time of the formation of the contract, the contract is a sale and not one for work and labor, although the seller is to do some work upon the article to adapt it to the uses of the purchaser. *Cooke v. Millard*, (1875) 65 N.Y. 352. But otherwise if the article be not so in existence at the time of the formation of the contract. *Parsons v. Loucks*, (1871) 48 N.Y. 17. (2) The Massachusetts rule was that, "a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." *Goddard v. Binney*, (1874) 115 Mass. 450; *In re Gies' Est.*, (1910) 160 Mich. 502; and see *Pitkin v. Noyes*, (1869) 48 N.H. 294. The English rule looks to the time of the performance of the contract. The New York rule looked to the time of the formation of the contract. The Massachusetts rule looked to the nature of the contract itself. See Benjamin on Sales, §§ 90-110, and Bennett's American notes; Mecham on Sales, §§ 294-326.

The American Sale of Goods Act closely adheres to the Massachusetts rule, which was the one most generally followed by the courts. See the New York statute, *ante*, § 110, note 1.

³ On acceptance and receipt as a means of satisfying the 17th section, see Bennett's Benjamin on Sales, §§ 138-88 and American notes; Mecham on Sales, §§ 353-403; Williston on Sales, §§ 74-97; *Sarkisian v. Teale*, (1909) 201 Mass. 596.

⁴ On part payment as a means of satisfying the 17th section, see Bennett's Benjamin on Sales, §§ 189-200 and American notes; Mecham on Sales, §§ 404-21; Williston on Sales, §§ 98, 99; part payment in the form of

ing is required, the rules applicable to contracts under § 4 of the Statute of Frauds apply to contracts under the Sale of Goods Act¹ with one exception.

116. Whether consideration must appear. The consideration for the sale need not, under this section, appear in writing unless the price is fixed by the parties. It then becomes a part of the bargain, and must appear in the memorandum.² Since the enactment only applies to contracts for the sale of goods, it will be presumed, if no consideration for the sale be set forth, that there is a promise to pay a reasonable price: but this presumption may be rebutted by evidence of an express verbal agreement as to price, so as to show that a memorandum which does not contain the price is insufficient.³

116a. "Acceptance." The definition of "acceptance" in subsection (3) should be noted. There is an acceptance within the meaning of § 4 when the buyer "does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." An example will make this clear. If *A* has verbally ordered a cask of wine of a certain quality over the value of £10 and on its arrival draws a sample to test the quality, his action recognizes a pre-existing contract; that is, it is only to be explained on the hypothesis that a contract exists. And therefore he had supplied the necessary evidence of a contract, even though he rejects the cask forthwith.⁴

It is to be observed that § 4 of the Statute of Frauds, so far as relates to contracts not to be performed within a year is not repealed by § 4 of the Sale of Goods Act where contracts for the sale of goods are concerned. Acceptance or receipt of the goods in these circumstances does not therefore dispense with the note or memorandum in writing required by the earlier statute.⁵

¹ *Headley v. McLaine*, (1834) 10 Bing. 482.

² For what does not, and what does, constitute acceptance, see *Page v. Morgan*, (1885) 15 Q.B.D. 228; *Taylor v. Smith*, [1893] 2 Q.B. (C.A.) 65; and see *Taylor v. Great Eastern Railway Company*, [1901] 1 K.B. 774.

³ *Prested v. Gardner*, [1910] 2 K.B. 776; [1911] 1 K.B. 425.

services rendered is sufficient. *Driggs v. Bush*, (1908) 152 Mich. 53. Payment on general account is enough to satisfy the statute as to all the items thereof, including those as to which there is no memorandum. *Berwin v. Bolles*, (1903) 183 Mass. 340.

⁴ On the note or memorandum as a means of satisfying the 17th section, see *ante*, §§ 101-06. And see *Bennett's Benjamin on Sales*, §§ 201-54, and *American notes*; *Mechem on Sales*, §§ 422-51; *Williston, Sales*, §§ 100-18.

⁵ *Ide v. Stanton*, (1843) 15 Vt. 685; *Ashcroft v. Butterworth*, (1884) 136 Mass. 511; *Hanson v. Marsh*, (1888) 40 Minn. 1.

⁶ *O'Neil v. Crain*, (1878) 67 Mo. 250.

(3) *Effect of non-compliance with statute*

117. **Contract unenforceable.** It remains to note that if there be no acceptance and receipt, no part payment, and no memorandum or note in writing, the section declares that the contract shall not be "enforceable by action."

The Sale of Goods Act has thus set at rest another question which, though practically settled had remained for a long time uncertain in the case of the 17th section of the Statute of Frauds. Like the 4th section of that statute, the requirements of the Sale of Goods Act do not affect the validity of the contract, they only impose conditions as to its proof.^{a 1}

IV. CONSIDERATION

118. **Consideration defined.** I have stated that consideration is the universal requisite of contracts not under seal, and this is generally true of such contracts, even when the law has prescribed a form in which they should be expressed, so long as the form is not that of a deed. It will be well therefore to start with a definition of consideration; and we may take that which is given in the case of *Currie v. Misa* :

"A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."^{b 2}

Consideration is something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in respect of the promise.³ It must necessarily be *in respect of*

^a *Taylor v. Gt. E. Railway*, [1901] 1 K.B. 779.

^b (1875) L.R. 10 Exch. 162.

¹ See §§ 107-09, *ante*.

² See *Hamer v. Sidway*, (1891) 124 N.Y. 538. "A benefit to the party promising, or a loss to the party to whom the promise is made." *Cook v. Bradley*, (1828) 7 Conn. 57.

³ No single definition that has been given serves to explain all the currently approved decisions. Consideration is a fact other than a seal, which, when it accompanies a promise, operates to create a legal duty in the promisor. Courts may give such operation (1) to facts long antecedent to the promise, (2) to contemporaneous facts regarded as the equivalent of and in exchange for the promise, and (3) to subsequent facts consisting of acts in reliance on the promise.

"In all contract law our problem is to determine what facts will operate to create legal duties and other legal relations. We find at the outset that bare words of promise do not so operate. Our problem then becomes one of determining what facts must accompany promissory words in order to

the promise, since consideration gives to the promise a binding force.

119. General rules. We may now lay down some general rules as to consideration:

1. It is necessary to the validity of every promise not under seal.
2. It need not be adequate to the promise, but must be of some value in the eye of the law.
3. It must be legal.
4. It must be either present or future, it must not be past.

1. *Consideration is necessary to the validity of every simple contract*

120. Necessity of consideration. The case of *Pillans v. Van Mierop*^a shows that the rule which I have laid down was

^a (1765) 3 Burr. 1063.

create a legal duty (and other legal relations). We must know what these facts are in order that we can properly predict the enforcement of reparation, either specific or compensatory, in case of non-performance. We are looking for a sufficient *cause* or *reason* for the legal enforcement of a promise. This problem was also before the Roman lawyers, and it must exist in all systems of law. With us it is called the problem of consideration." 27 *Yale Law Journal*, 362, 376.

In *Calthorpe's Case*, (1574) 2 Dyer, 336b, 34, it was said: "A consideration is a cause or meritorious occasion, requiring a mutual recompense, in fact or in law. Contracts and bargains have a *quid pro quo*."

It will be observed that the definition of the author as stated above differs from that given in the quotation from *Currie v. Misa*. The author's definition would require consideration always to be a detriment to the promisee, while by the other definition a benefit to the promisor might be sufficient even though the promisee incurs no detriment. The definition most commonly given by the courts is in the alternative form — a benefit to the promisor or a detriment to the promisee, and it seems to represent the prevailing law. See Samuel Williston, "Consideration in Bilateral Contracts," (1914) 27 *Harvard Law Review*, 518, 524; Edmund M. Morgan, "Benefit to Promisor as Consideration," (1917) 1 *Minnesota Law Review*, 383. A decision clearly in agreement is *Union Bank v. Sullivan*, (1915) 214 N.Y. 332. See also *infra*, § 128, note. For general discussion of this topic, see: Ashley, 26 *Harvard Law Review*, 429; Ames, 2 *Harvard Law Review*, 14; 12 *ibid.* 521, 13 *ibid.* 29, 37; Ballantine, 11 *Michigan Law Review*, 423, 28 *Harvard Law Review*, 121; Williston, 8 *Harvard Law Review*, 29, 27 *ibid.* 503; 2 Street, *Foundations of Legal Liability*.

The idea that consideration must always be a detriment to the promisee arose from the suggestion that its origin and character must be sought solely in the history of the common-law action of *assumpsit*. That action did, indeed, play a leading part in the development of contract law; but we must look to other sources as well, particularly to equity and to the common-law action of *debt* to determine the application and limits of the present nebulous doctrine of consideration.

These two exceptions represent legal obligations recognized in the courts before the doctrine of consideration was clearly formulated; they were engrafted upon the common law, in the first case from the historical antecedents of contract, in the second from the law merchant. It is better to recognize these exceptions, to define them and to note their origin, than to apply the doctrine of consideration by forced and artificial reasoning to legal relations which grew up outside it.

2. *Consideration need not be equal to the promise in market value, but must be of some value*¹

123. **Market value of consideration immaterial.** Courts of law will not make bargains for the parties to a suit, and, if a man gets what he has contracted for, will not inquire whether it was an equivalent to the promise which he gave in return. The consideration may be a benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promisee: in any case "its adequacy is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced."²

The following case will illustrate the rule.

Bainbridge owned two boilers, and at the request of Firmstone allowed him to weigh them on the terms that they were restored in as good a condition as they were lent. Firmstone took the boilers to pieces in order to weigh them and returned them in this state, and for breach of his promise Bainbridge sued him. The defendant was held liable.

"The consideration is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit: at any rate there is a detriment to the plaintiff from his parting with the possession for ever so short a time."³

^a Per Blackburn, J., *Bolton v. Madden*, (1873) L.R. 9 Q.B. 55.

^b *Bainbridge v. Firmstone*, (1838) 8 A. & E. 743.

¹ But the consideration is required to be adequate where the contract merely calls for an exchange of different sums of money at the same time, or at different times when the parties do not look upon the element of time as an equivalent. *Schnell v. Nell*, (1861) 17 Ind. 29; *Shepard v. Rhodes*, (1863) 7 R.I. 470. Cf. *Peabody v. Speyers*, (1874) 56 N.Y. 230 (sale of gold for currency).

² *Devecmon v. Shaw*, (1888) 69 Md. 199; *Hamer v. Sidway*, (1891) 124 N.Y. 538; *Dunton v. Dunton*, (1892) 18 Vict. L.R. 114 (living soberly and respectably).

In *Haigh v. Brooks*,^a the consideration of a promise to pay certain bills of a large amount was the surrender of a document supposed to be a guarantee, which turned out to be unenforceable. The worthlessness of the document surrendered was held to be no defense to an action on the promise. "The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise."¹

In *De la Bere v. Pearson*,^b Vaughan Williams, L.J., thus described the contract sued upon:

"The defendants advertised, offering to give advice with reference to investments. The plaintiff, accepting that offer, asked for advice, and asked for the name of a good stockbroker. The questions and answers were, if the defendants chose, to be inserted in their paper as published; such publication might obviously have a tendency to increase the sale of the defendants' paper. I think that this offer, when accepted, resulted in a contract for good consideration."

Equity treats inadequacy of consideration as corroborative evidence of fraud or undue influence, such as may enable a promisor to resist a suit for specific performance, or get his promise canceled. But mere inadequacy of consideration, unless, in the words of Lord Eldon, it is so gross as "to shock the conscience and amount in itself to conclusive evidence of fraud,"^c is not of itself a ground on which specific performance of a contract will be refused.²

124. Types of sufficient consideration; executed and executory. Though consideration need not be adequate it must satisfy certain requirements. This leads us to ask what is meant by saying that consideration must be "something of some value in the eye of the law."

^a (1840) 10 A. & E. 309.

^b [1906] 1 K. B. 280, 287.

^c *Coles v. Trecothick*, (1804) 9 Ves. 246.

¹ *Judy v. Louderman*, (1891) 48 Ohio St. 562 (parting with a document); *Brooks v. Ball*, (1820, N.Y.) 18 Johns. 337 (promise to pay disputed claim if promisee would make oath to its correctness); *Wolford v. Powers*, (1882) 85 Ind. 294 (promisee names child after promisor); *Gardner v. Denison*, (1914) 217 Mass. 472 (same), 51 L.R.A. (N.S.) 1108, and note; *Hoshor v. Kauts*, (1898) 19 Wash. 258; *Sykes v. Chadwick*, (1873, U.S.) 18 Wall. 141 (release of supposed right of dower); *Kinsman v. Parkhurst*, (1855, U.S.) 18 How. 289 (license to use invalid patent). "The distinction must be carefully observed, however, between a bargain for the paper, and a bargain for the title, right, or obligation which the paper was supposed to give." Wald's *Pollock on Cont.*, Williston's ed., 194.

² *Seymour v. De Lancy*, (1824, N.Y.) 3 Cow. 445; *Franklin Co. v. Harrison*, (1892) 145 U.S. 459; *Hall v. Perkins*, (1829, N.Y.) 3 Wend. 626.

The definition of consideration, supplied by the Court of Exchequer Chamber in *Currie v. Misa*,^a amounts to this — that consideration is something done, forborne, or suffered, or promised to be done, forborne, or suffered, by the promisee in respect of the promise. Therefore it may be, (1) a present act, forbearance, or sufferance, constituting either the offer or the acceptance of one of the parties, and being all that can be required of him under the contract; or (2) a promise to do, forbear, or suffer, given in return for a like promise. In the first case the consideration is present or executed, in the second it is future or executory.¹

The offer of a reward for information, accepted by the supply of the information required; the offer of goods, accepted by their use or consumption, are illustrations of executed consideration.

^a (1875) L.R. 10 Exch. 162.

¹ This distinction is that existing between bilateral and unilateral contracts. See *ante* §§ 36-39. There has been much discussion as to the reasons for holding that a promise is a sufficient consideration for another promise, and as to what kinds of promises are sufficient. The subject cannot be fully discussed within the limits of these notes.

It is not every promise that is a sufficient consideration for a return promise. The test has been stated as follows: "Where the doing a thing will be a good consideration, a promise to do that thing will be so too." Holt, L.C.J., in *Thorp v. Thorp*, (1701) 13 Mod. 455.

"So far as regards the matter of the consideration, as being executed or executory it may be observed that whatever matter, if executed, is sufficient to form a good executed consideration; if promised, is sufficient to form a good executory consideration: so that the distinction of executed and executory consideration has no bearing upon the question of the sufficiency of any particular matter to form a consideration." Leake, *Contracts* (1st ed.), p. 314; (2d ed.), pp. 612, 613. See Professor S. W. Williston, "Consideration in Bilateral Contracts," 27 *Harvard Law Review*, 503, 518.

A promise is generally held to be a valid consideration for a return promise even though it is voidable for infancy; *Holt v. Ward*, (1732) 2 Strange, 937; or for insanity; *Atwell v. Jenkins*, (1895) 163 Mass. 362. The weight of authority also is that where a bilateral contract is within the statute of frauds, the contract is enforceable against the one who has signed even though the other party has not signed, the latter's oral promise being valid consideration. See notes 28 L.R.A. (N.S.) 680; 43 L.R.A. (N.S.) 410; *contra*, *Houser v. Hobart*, (1912) 22 Idaho, 735.

The theory that consideration must always be a detriment to the promisee is not properly applicable to bilateral contracts. See 2 Street, *Foundations of Legal Liability*; Holdsworth in 11 *Michigan Law Review*, 347; Corbin, "Does a Pre-existing Duty Defeat Consideration?" (1918) 27 *Yale Law Journal*, 362, 374.

For further discussions see Ames, "Two Theories of Consideration," 12 *Harvard Law Review*, 515; Williston, "Successive Promises of the Same Performance," 8 *Harvard Law Review*, 27; Langdell, "Mutual Promises as a Consideration," 14 *Harvard Law Review*, 496.

Mutual promises to marry; a promise to do work in return for a promise of payment, are illustrations of executory consideration.

And the fact that the promise given for a promise may be dependent upon a condition does not affect its validity as a consideration. *A* promises *X* to do a piece of work for which *X* promises to pay if the workmanship is approved by *M*. The promise of *X* is consideration for the promise of *A*.¹

125. Tests of sufficiency. In the application of this rule we must ask, when action is brought upon a promise:

(a) Did the promisee do, forbear, suffer, or promise *anything* in respect of the promise to him?

(b) Was his act, forbearance, sufferance, or promise of any ascertainable value?

(c) Was it more than he was already legally bound to do, forbear, or suffer?

On the answer to these questions depends the legally operative character of the consideration.

(a) First test of sufficiency of consideration

126. The two rules. Apart from the opinions expressed by Lord Mansfield,² we find cases in comparatively modern times which have raised a doubt whether consideration, under certain circumstances, is necessary to make a promise actionable.

The cases have resulted in the establishment of two rules:

Motive is not the same thing as consideration.

Consideration must move from the promisee.

127. Inducing cause and subsequent reliance. Motive. In *Thomas v. Thomas*,^a a widow sued her husband's executor for breach of an agreement to allow her to occupy a house, which had been the property of her husband, on payment of a small portion of the ground-rent. The executor in making

^a (1842) 2 Q.B. 851.

¹ *Duplex Safety Boiler Co. v. Garden*, (1886) 101 N.Y. 387; *Adams Radiator & Boiler Works v. Schnader*, (1893) 155 Pa. 394; *Ray v. Thompson*, (1853, Mass.) 12 Cush. 281; *Wells v. Alexandre*, (1891) 130 N.Y. 642; *Lima L. & M. Co. v. National Steel Castings Co.*, (1907) 155 Fed. 77, 11 L.R.A. (N.S.) and note. In all aleatory, or wagering contracts the promises are expressly conditional upon some uncertain event, and yet it is never held that such promises are insufficient as consideration. *Christie v. Borelly*, (1860) 29 L.J. C.P. 153; *Seward v. Mitchell*, (1860, Tenn.) 1 Cold. 87; *Earl of March v. Pigot*, (1771) 5 Burr. 2802.

² See § 120 *ante*.

the agreement was carrying out a wish expressed by the deceased that his wife should have the use of the house. The court held that the desire to carry out the wishes of the deceased would not amount to a consideration. "*Motive is not the same thing with consideration. Consideration means something of some value in the eye of the law, moving from the plaintiff.*" But it was further held that the undertaking to pay ground-rent by the plaintiff was a consideration for the defendant's promise, and that the agreement was binding.¹

¹ The word "motive" is a word that may be used either subjectively or objectively. In the latter sense, the promisor's motive is the *objective fact* that he desires. In the former sense, his motive is his *subjective desire* itself. In the latter sense, motive is never a consideration; but in the former sense, motive and consideration may be identical. There are many dicta to the effect that *consideration for a promise must be at least one of the objective inducements or causes of the promise*. Thus, in *Martin v. Meles*, (1901) 179 Mass. 114, Mr. Justice Holmes says: "Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. There must be some ground for saying that the acts done in reliance upon the promise *were contemplated* by the form of the transaction either impliedly or in terms as the conventional motive, inducement, and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes, perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise." See also *Wisconsin & Mich. R.R. Co. v. Powers*, (1903) 191 U.S. 379, 386.

It may be stated without hesitation that the *consideration need not be the sole, or even the chief, objective inducement and cause of the promise*. The causes and motives of human action are always complex, and the fact that a contractor had other inducements which might have been sufficient in themselves to cause him to perform is not material. This is the doctrine of *Thomas v. Thomas*, *supra*. See also *De Cicco v. Schweizer*, (1917, N.Y.) 117 N.E. 807, discussed by the present editor in 27 *Yale Law Journal*, 362, 366. Likewise, there are many inducing causes for making a promise that are not legally operative as a consideration; e.g., see *Schnell v. Nell*, (1861) 17 Ind. 29.

In the numerous cases where it is held that a past consideration is sufficient, it is certain that the consideration is not the inducing cause of the promise; that is, it is not the promisor's object of desire, because it has already been attained. See *post*, §§ 148-52.

In the quotation from *Martin v. Meles*, *supra*, while asserting that a promise does not become binding merely because the promisee *relies* upon it, Mr. Justice Holmes admits that acts have frequently been held to be a sufficient consideration even though they were mere conditions or *consequences* of the promise and not an inducing cause thereof. Indeed, there are many cases justifying the statement that *consideration may consist of acts in reliance upon a promise even though they were not specified as the agreed equivalent and inducement, provided the promisor ought to have foreseen that such action would take place and the promisee reasonably believes it to be desired*. See the following cases: *Traver v. —*, (1661) 1 Sid. 57; *Wild v. Harris*, (1849) 7 C.B. 999; *Millward v. Littlewood*, (1850) 5 Exch. 775; *Brooks v. Ball*, (1820) 18 Johns. 337; *Wigan v. Eng. etc. Life Ass. Ass'n*,

The confusion of motive and consideration has appeared in other ways.

Good consideration. The distinction between *good* and *valuable* consideration, or family affection as opposed to money value, is only to be found in the history of the law of real property.¹

Moral consideration. Motive has most often figured as consideration in the form of a moral obligation to repay benefits received in the past. It is clear that the desire to repay or reward a benefactor is indistinguishable, for our purposes, from a desire on the part of an executor to carry out the wishes of a deceased friend, or a desire on the part of a father to pay the debts of his son. The mere satisfaction of such a desire, unaccompanied by any present or future benefit accruing to the promisor or any detriment to the promisee, cannot be regarded as of any value in the eye of the law.²

^a *Mortimore v. Wright*, (1840) 6 M. & W. 482.

[1909] 1 Ch. 291, 298 (*semble*; "*ex post facto* consideration"); *Devecmon v. Shaw*, (1888) 69 Md. 199; *Dunton v. Dunton*, (1892) 18 Vict. L.R. 114; *Shadwell v. Shadwell*, (1860) 30 L.J. C.P. 145; *Ricketts v. Scothorn*, (1896) 57 Neb. 51; *State v. Lattanner*, (Ohio, 1916) 113 N.E. 1045; L.R.A. 1917 B, 684, and note; *Union Bank v. Sullivan*, (1915) 214 N.Y. 332; *DeCicco v. Schweiser*, (1917, N.Y.) 117 N.E. 807; *State Bank v. Kirk*, (1907) 216 Pa. 452; *Skordal v. Stanton*, (1903) 89 Minn. 511; *Hay v. Fortier*, (1917, Me.) 102 Atl. 294; see also *post*, § 142, "*Mutual Subscriptions*"; *Martin v. Meles*, *supra*.

A promise by the owner of land to make a gift thereof will be specifically enforced in equity if the donee is induced thereby and in reliance thereon to go into possession and make valuable improvements. Expenditures of this sort in money or labor, are held to "constitute a consideration for the promise." *Messiah Home v. Rogers*, (1914) 212 N.Y. 315; *Freeman v. Freeman*, (1870) 43 N.Y. 34; *Leavey v. Drake*, (1882) 62 N.H. 373; *Neale v. Neale*, (1869) 76 U.S. 1; 1 Ames Cases Eq. 306, 308, citing many cases in notes.

¹ *Fink v. Cox*, (1820, N.Y.) 18 Johns. 145; *Stovall v. Barnett*, (1823, Ky.) 4 Littell, 207. The doctrine of good consideration (i.e., relationship) has no application except in conveyancing under the Statute of Uses or in marriage settlements. See the arguments of counsel in *Sharlington v. Strotton*, (1566) 1 Plowden, 298. Only a valuable consideration will support an executory promise. *Fischer v. Union Trust Co.*, (1904) 138 Mich. 612; 68 L.R.A. 987.

² While it is true that the mere subjective desire of the promisor is not a sufficient consideration, nevertheless in many instances the objective facts of the past, out of which that desire grew, constitute a sufficient cause and consideration for the enforcement of the promise (*post*, §§ 145-52). This is no doubt because the courts feel the weight, in those instances, of the social pressure called *moral obligation*. Moral obligation, so-called, and the facts causing such moral obligation, are generally stated not to be a sufficient consideration. *Cook v. Bradley*, (1828) 7 Conn. 57; *Mills v. Wyman*, (1826, Mass.) 3 Pick. 207; *Strevell v. Jones*, (1905) 106 App. Div. N.Y. 334; *East-*

. At the end of the eighteenth, and beginning of the nineteenth century, the moral obligation to make a return for past benefits had obtained currency in judicial language as an equivalent to consideration. The topic belongs to the discussion of past as distinguished from executed or present consideration, but it is well here to insist on the truth that past consideration is no consideration,¹ and that what the promisor gets in such a case is the satisfaction of motives of pride or gratitude. The question was settled once for all in *Eastwood v. Kenyon*,^a and a final blow given to the doctrine that past benefits would support a subsequent promise on the ground of the moral obligation resting on the promisor.² "The doctrine," says Lord Denman, "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."

128. Must consideration move from the promisee? It has been argued that where two persons make a contract in which one of them promises to confer benefits upon a third party, the third party can sue upon the contract for the money or other benefit which it is agreed that he should receive.

The matter concerns mainly the operation of contract, but it is plain that if such a contention were well founded, a man could sue on a promise not made to him, nor supported by any consideration which he had furnished.³

a (1840) 11 A. & E. 438.

wood v. Kenyon, (1840) 11 A. & E. 438; notes in L.R.A. vol. 53, p. 353, vol. 26 (N.S.), p. 436, vol. 7 (N.S.), p. 1048, vol. 26 (N.S.), 520. In a few states by statute and in some by judicial decision a strong moral obligation may support a promise. Ga. Code, (1895) § 3658; *Gray v. Hamil*, (1889) 82 Ga. 375; *Robinson v. Hurst*, (1893) 78 Md. 59; *Holden v. Banes*, (1891) 140 Pa. 63; *Spear v. Griffith*, (1877) 86 Ill. 552. And see the reasoning in *Edwards v. Nelson*, (1883) 51 Mich. 121.

¹ That is, "no agreed equivalent." ? Cf. note 1, *supra*.

² This involves two questions: (1) May a party for whose benefit a contract is made, but who is not himself a promisee or assenting party (in privity), maintain suit against the promisor? "The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." Mr. Justice Davis, in *Hendrick v. Lindsay*, (1876) 93 U.S. 143, 149. For a discussion of this point, see *post*, §§ 280-91. (2) May a promisee who gave no consideration maintain suit where the promisor received a consideration therefor from a third person? It has been held in England that he cannot. *Dunlop v. Selfridge*, [1915] A.C. 847: cf. *West Yorkshire v. Coleridge*, [1911] 2 K.B. 326. It has been held in America that if the promise is made *directly to the plaintiff*, he may recover upon it although the consideration moves from another. *Rector v. Teed*, (1890) 120 N.Y. 583; *Palmer Sav. Bk. v. Ins. Co.*, (1896) 166 Mass. 189; *Van Eman v. Stanchfield*,

It was at one time held that where *A* made a binding promise to *X* to do something for the benefit of the son or daughter of *X*, the nearness of relationship, and the fact that the contract was prompted by natural affection, would give a right of action to the person interested.^{a 1}

This, however, is no longer law.

"Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*."^{b 2}

But where an agent is instructed to obtain a promise for his principal and to provide consideration, the consideration moves from the principal, not from the agent; though the party from whom the consideration moves must in truth have been contracting as agent for the party claiming the benefit of the contract.^c The case of the broker who is instructed to procure a marine insurance policy on behalf of a client may perhaps at first sight appear to be an exception to this rule, for by the law merchant the broker alone, and not the client, was liable to the underwriter for the premium, a liability now made statutory by the Marine Insurance Act, 1906.^d The effect therefore of this long-recognized custom is that the underwriter, having agreed with the client for payment of the premium, agrees also to take the credit of the broker instead of the client. This is not, as Lord Esher pointed out in *Universo Company v. Merchant's Marine Insurance*,^e a contradiction of the terms of the policy, but a mode of carrying them out; and since the client is bound

^a *Dutton v. Poole*, (1877) 2 Lev. 210.

^b Lord Haldane, *Dunlop v. Selfridge*, [1915] A.C. 847, 853.

^c *Dunlop v. Selfridge*, *supra*. ^d 6 Edw. VII. c. 41, § 53. ^e [1897] 2 Q.B. 93, 96.

(1879) 10 Minn. 255 (discusses the specific point at length). It is often on this ground that compositions with creditors are sustained (see *post*, § 141), and also agreements to make mutual subscriptions for charitable or other purposes (see *post*, § 142, note).

See also *Gardner v. Denison*, (1914) 217 Mass. 492; *Eaton v. Libbey*, (1896) 165 Mass. 218; cf. *Furbish v. Goodnow*, (1867) 98 Mass. 296.

¹ *Dutton v. Poole* is sometimes followed in this country. *Schemerhorn v. Vanderheyden*, (1806, N.Y.) 1 Johns 139; *Buchanan v. Tilden*, (1899) 158 N.Y. 109; *Lawrence v. Oglesby*, (1899) 178 Ill. 122. See §§ 284-91, *post*.

² It has been contended by many that the right of a *cestui que trust* is not a property right but is a mere right *in personam*. Whether it should be classified as one or the other, the recognition of such rights in beneficiaries who are not "in privity" and who gave no consideration is curiously out of harmony with the refusal to recognize rights in the beneficiary of a contract.

to supply the broker with the necessary funds for paying the underwriter, we may still say that the consideration moves from the client,¹ even though, by virtue of the custom referred to, the underwriter is only entitled to sue the agent and not the principal for the premium which the latter has agreed to pay.

And so the rule holds true that a promisor cannot be sued on his promise if he made it merely to satisfy a motive or wish, nor can he be sued on it by one who did not furnish the consideration on which the promise is based.

(b) *Second test of sufficiency of consideration*

We now come to the class of cases in which the consideration turns out to be of no ascertainable value.

129. **Obvious impossibility.** Physical or legal impossibility, obvious upon the face of the contract, makes the consideration unreal. The impossibility must be *obvious*, such as is "according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted." If it is only a practical impossibility, present or subsequent, such as would arise from the death or destruction of the subject of the contract, unknown to the parties or unexpected by them when the contract was made, the effect would be different. The contract might be avoided in the first case on the ground of mistake, or discharged in the second case on the ground of subsequent impossibility.

But a promise to pay money in consideration of a promise to discover treasure by magic, to go round the world in a week, or to supply the promisor with a live pterodactyl, would be void for unreality in the consideration furnished.²

And an old case furnishes us with an instance of a legal impossibility. A bailiff was promised £40 in consideration of a promise made by him that he would release a debt due to his

¹ Just as in the case of other legal fictions, "we may still say" what we please, in order to produce the desired result without admitting that we are infringing upon a supposedly invariable rule.

² This expression has been criticized. See 7 *Col. Law Review*, 448. The word "unreal" is doubtless ill-chosen, but the author is not wholly without defense in ascribing the invalidity of the contract to lack of consideration. If the parties know of the impossibility, there may be said to be no intention to make a contract; but whatever their intention may have been, it is submitted that the courts would not sustain a suit for damages for non-performance of the impossible promise. If they did not know of the impossibility, the transaction is said to be void because of mistake.

master. The court held that the bailiff could not sue; that the consideration furnished by him was "illegal," for the servant cannot release a debt due to his master. By "illegal" it is plain that the court meant legally impossible.^{a 1}

130. Uncertainty. Again, a promise which purports to be a consideration may be of too vague and unsubstantial a character to be enforced.

A son gave a promissory note to his father: the father's executors sued him upon the note, and he alleged that his father had promised to discharge him from liability in consideration of a promise on his part that he would cease from complaining, as he had been used to do, that he had not enjoyed as many advantages as his brothers. It was said that the son's promise was no more than a promise "not to bore his father," and was too vague to form a consideration for the father's promise to waive his rights on the note.^{b 2}

So too promises to pay such remuneration *as shall be deemed right;*^c to retire from the practice of a trade *so far as the law allows;*^d have been held to throw upon the courts a responsibility of interpretation which they are not prepared to assume. These cases correspond with offers held to be incapable of creating legal relations, as described in § 55.^e

131. Forbearance to sue. Cases occur in which it is hard to determine whether the consideration is or is not sufficient. A good illustration of such cases is afforded by promises of forbearance to exercise a right of action or agreements to compromise a suit.

A forbearance to sue, even for a short time, is consideration

^a *Harvey v. Gibbons*, (1676) 2 Lev. 161.

^b *White v. Blunett*, (1853) 23 L.J. Exch. 36.

^c *Taylor v. Brewer*, (1813) 1 M. & S. 260.

^d *Davies v. Davies*, (1886) 36 Ch. D. 359.

¹ *Beebe v. Johnson*, (1838, N.Y.) 19 Wend. 500 (cf. *Adams v. Messinger*, (1888) 147 Mass. 185; *Stevens v. Coon*, (1843, Wis.) 1 Pinney, 356; *Merrill v. Packer*, (1890) 80 Ia. 542.

² In the absence of a command from the father, the son would be privileged to make complaints. A forbearance to exercise this privilege seems to be perfectly definite and to be worth the money.

A promise to pay a divorced wife an allowance if she would conduct herself with sobriety and in a respectable, orderly and virtuous manner, was held to rest upon a sufficiently definite consideration. *Dunton v. Dunton*, (1892) 18 Vict. L.R. 114.

³ *Sherman v. Kitamiller*, (1827, Pa.) 17 Serg. & R. 45; *Hart v. Georgia R.*, (1897) 101 Ga. 188; *Marble v. Standard Oil Co.*, (1897) 169 Mass. 553; *United Press v. N.Y. Press Co.*, (1900) 164 N.Y. 406; *Fairplay School Tp. v. O'Neal*, (1890) 127 Ind. 95. But that is certain which can be rendered certain. *Caldwell v. School Dist.*, (1893) 55 Fed. 372.

for a promise, although there is no waiver or compromise of the right of action.¹

In the *Alliance Bank v. Broom*,^a Messrs. Broom were asked to give security for moneys owing by them to the bank. They promised to assign the documents of title to certain goods; they failed to do so, and the bank sued for specific performance of the promise.

The court held that

"although there was no promise on the part of the bank to abstain for any certain time from suing for the debt, the effect was that the bank did give and Messrs. Broom received the benefit of some degree of forbearance, not indeed for any definite time, but at all events some degree of forbearance."²

To use the expression adopted by the court in a similar case, the promise to give security "stayed the hand of the creditor."

On the other hand,

"where there is no communication of the security, where there is no express agreement, and there are no circumstances from which the court can imply any agreement, then there is no possibility of its being said with any justice that any consideration has been given at all."³

But in order that the forbearance should be a consideration some liability must be shown to exist,⁴ or to be reasonably supposed to exist by the parties.⁵ In *Jones v. Ashburnham*^c action was brought on a promise to pay £20 to the plaintiff

^a (1864) 2 Dr. & Sm. 289.

^b *Wigan v. English & Scottish Ac. Association*, [1909] 1 Ch. 291 at p. 298.

^c (1804) 4 East. 458.

¹ *Pennsylvania Coal Co. v. Blake*, (1881) 85 N.Y. 226.

² Actual forbearance, relying on the promise, although the promisee is not bound to forbear, is a good consideration if it is agreed upon as such; but if the offer empowers the offeree to accept only by making a promise, an actual forbearance is no acceptance. In the first case there is a unilateral contract; in the second it must be bilateral. See *Strong v. Sheffield*, (1895) 144 N.Y. 392; *Edgerton v. Weaver*, (1882) 105 Ill. 43; *Miles v. New Zealand Alford Est. Co.*, (1886) 32 Ch. D. 266; cf. *Hay v. Fortier*, (1917, Me.) 102 Atl. 294. The following cases failed to see the possibility of a unilateral contract; *Manter v. Churchill*, (1879) 127 Mass. 31; *Shupe v. Galbraith*, (1858) 32 Pa. 10.

³ In this case there was actual forbearance, but it was not agreed upon as the equivalent of a promise nor was it shown to have been given as the consequence of a promise.

⁴ *Foster v. Metts*, (1877) 55 Miss. 77; *Fink v. Smith*, (1895) 170 Pa. 124; *Taylor v. Weeks*, (1901) 129 Mich. 233.

⁵ *Mulholland v. Bartlett*, (1874) 74 Ill. 58; *Barlow v. Ocean Ins. Co.*, (1842, Mass.) 4 Met. 270; *Palfrey v. Portland R.*, (1862, Mass.) 4 Allen, 55. If the claim is void as a matter of positive and unquestioned law, forbearance is not a sufficient consideration. *Loyd v. Lee*, (1718) 1 Stra. 94; *Herring v. Dorell*, (1840) 8 Dowl. Prac. Cas. 604; cf. *Cook v. Wright*, (1861) 1 B. & S. 559.

in consideration of his forbearance to sue for a debt which he alleged to be due to him from a third party deceased. The pleadings did not state that there were any representatives of the dead man towards whom this forbearance was exercised, nor that he had left any assets to satisfy the claim. It was a mere promise not to sue persons unknown for a sum which was not stated to be in existence or recoverable, and was held to be no consideration for a promise. "How," said Lord Ellenborough, "does the plaintiff show any damage to himself by forbearing to sue when there was no fund which could be the object of suit, when it does not appear that any person *in rerum natura* was liable to him?"¹

132. **Compromise of suit.** The compromise of a suit furnishes consideration of the same character.² In the case of forbearance the offer may be put thus: "I admit your claim but will do or promise something if you will stay your hand." In the case of a compromise the offer is "I do not admit your claim" (or "defense" as the case may be), "but I will do or promise something if you will abandon it."

But it has been argued that if the claim or defense is of an unsubstantial character the consideration fails. The answer is to be found in the judgment of Cockburn, C.J., in *Callisher v. Bischoffsheim*.

"Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bona fide* believes that he has a fair chance of succeeding he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue, he gives up what he believes to be a right of action and the other party gets an advantage, and instead of being annoyed with an action he escapes the vexations incident to it. It would be another matter if a person made a claim which he knew to be unfounded and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent."³

^a *Callisher v. Bischoffsheim*, (1870) L.R. 5 Q.B. 449.

¹ The consideration was sufficient in this case, if the plaintiff's averment shows that he forbore to take any action that he was privileged to take. It is wholly immaterial whether or not there was a fund available. Forbearance to sue an insolvent with no assets would be sufficient consideration. So too would be the forbearance to take steps to have an administrator appointed. However, the plaintiff alleged merely that he had "forborne and given day of payment." The court may be justified in sustaining a demurrer to this, because it does not make sufficiently clear that there was some possible action that the plaintiff was privileged to take and from which he forbore.

² *Russell v. Cook*, (1842, N.Y.) 3 Hill, 504.

³ In compromise courts are generally satisfied if the promisee honestly

If therefore it is clear that one of the parties to the compromise has no case, and knows that he has none, the agreement to compromise would not be held binding.^{a 1}

133. Gratuitous bailment. A different kind of difficulty has arisen in cases of the gratuitous bailment or deposit of chattels, and in cases of gratuitous employment. Here the law imposes a liability, independent of contract, upon the depositary or the person employed. The relations of the parties therefore originate sometimes in contract, sometimes in the voluntary act of the party liable, and the cases need to be carefully studied in order to ascertain the precise legal relation with which the courts are dealing.

A chattel may be bailed, or placed in the charge of a bailee or depositary, for various purposes—for mere custody, for loan, for hire, for pledge, for carriage, or in some other way to be dealt with or worked upon. In every case the relations of the

^a *Wade v. Simeon*, (1846) 2 C.B. 548.

believes in his claim. *Grandin v. Grandin*, (1887) 49 N.J. L. 508; *Bowers &c. Co. v. Hess*, (1904) 71 N.J. L. 327; *Wahl v. Barnum*, (1889) 116 N.Y. 87; *Zoebisich v. Von Minden*, (1890) 120 N.Y. 406; *Bellows v. Sowles*, (1884) 57 Vt. 164. *Contra*: *U.S. Mortgage Co. v. Henderson*, (1886) 111 Ind. 24; *Peterson v. Breitag*, (1893) 88 Iowa, 418.

"It is the settled law of this state that if a debt or claim be disputed or contingent at the time of payment the payment when accepted of a part of the whole debt is a good satisfaction, and it matters not that there was no solid foundation for the dispute. The test in such cases is, was the dispute honest or fraudulent? If honest it affords the basis for an accord between the parties, which the law favors, the execution of which is the satisfaction." *Post v. Thomas*, (1914) 212 N.Y. 264, 273, citing *Simons v. Amer. Leg. of Honor*, (1904) 178 N.Y. 263.

In *Silver v. Graves*, (1911) 210 Mass. 26, it is said: "The intention must be sincere to carry on a litigation which is believed to be well grounded and not false, frivolous, vexatious or unlawful in its nature. The abandonment of an honest purpose to carry on a litigation, even though its character be not such, either in law or fact or both, as ultimately to commend itself to the judgment of the tribunal which finally passes upon the question, is a surrender of something of value, and is a sufficient consideration for a contract. But the giving up of litigation, which is not founded in good faith, and which does violence to an enlightened sense of justice in view of the knowledge of the one making the concession, is not the relinquishment of a thing of value, and does not constitute a sufficient consideration for a contract." To same effect *Mackin v. Dwyer*, (1910) 205 Mass. 472; *Blount v. Wheeler*, (1908) 199 Mass. 330; *Prout v. Pittsfield Fire Dist.*, (1891) 154 Mass. 450.

¹ Nor would forbearance to sue or dismissal of suit be a sufficient consideration. *Smith v. Monteith*, (1844) 13 M. & W. 427 (*semble*). Forbearance in the case of a claim, the validity of which depends wholly upon a doubtful principle of law, has been thought sufficient. *Longridge v. Dorville*, (1821) 5 B. & Ald. 117.

parties originate in contract: but in every case a duty to use reasonable care is imposed *by law* on the bailee, and failure to use such care constitutes a wrong independently of contract.

The bailor has always a remedy for failure to use care; he can bring an action *ex delicto*, for negligence. If his matter of complaint extends beyond this he must rely upon the terms of the contract,^a and if the bailment itself is gratuitous, and an action is brought *ex contractu*, we must seek for the consideration which supports the contract. It has been laid down constantly, and may be taken as settled law, that the fact of parting with the possession of property is a detriment to the bailor which furnishes consideration for a promise by the bailee to take reasonable care of the property, or to do certain services in respect of it.¹

Thus *A* allowed two bills of exchange to remain in the hands of *X*, and *X* thereon promised that if he could get the bills discounted he would do so and pay the proceeds to the account of *A*. This promise was held to be made on good consideration, namely the permission given to *X* to retain the custody of the bills.^{b 2}

It will be noted that the bailee here undertook something more than mere custody, that the action was *ex contractu*, and that therefore consideration was required to be shown.

In the case of bailment of a chattel the owner parts with possession, but no such consideration is to be found in cases of gratuitous employment.

134. Gratuitous service. *A* offers to do *X* a service without reward: the offer is accepted: no action would lie if the service were not performed, because there is no consideration for the promise of *A*: and yet there is abundant authority for saying that if the service is entered upon, and performed so negligently that *X* thereby suffers loss or injury, there is a liability which the courts would recognize.

A promised *X* to build him a warehouse by a certain day. *X* sued *A* for non-completion of the warehouse within the promised time, and also for having increased the cost of the

^a *Turner v. Stallibrass*, [1898] 1 Q.B. 60.

^b *Hart v. Miles*, (1856) 4 C.B. (N.S.) 571.

¹ *Robinson v. Threadgill*, (1851, N.C.) 13 Ired. 39; *Clark v. Gaylord*, (1856) 24 Conn. 484. But the theory of contract in gratuitous bailment is largely fictitious, as for example in the case of a finder of lost goods. *Smith v. Nassau &c. R.*, (1853) 27 N.H. 86.

² *Wilton v. Eaton*, (1879) 127 Mass. 174; *Preston v. Tooley*, (1587) Cro. Elis. 74.

building by having used new materials instead of old materials, which he was ordered to use as far as they would go.

The promise of *A* was gratuitous, and the court held that, on this account, he was not liable on his promise to complete within a given time; but that, having entered on the work and by disobedience to orders increased its cost, he was liable for a misfeasance.^a

Again, Coverdale undertook, gratuitously, to effect an insurance of Wilkinson's house. This he did, but owing to his neglect of some formalities Wilkinson could recover nothing on the policy when the house was burned down. Coverdale was held liable in damages to Wilkinson;¹ but if he had refused to carry out his promise he would have incurred no liability.^{b 2}

135. Grounds of liability for gratuitous undertakings. It may be said that this action was on the case for negligence;^c but the liability was stated to arise on the promise, and was disputed on the ground that there was no consideration for the promise. It was therefore based on contract, and there could be no question here as in *Turner v. Stallibrass*, of a common law liability superimposed on an acknowledged contract of bailment.

It seems a mistake to discuss the liabilities of to-day on the basis of a system of pleading which only provided circuitous and artificial remedies for breach of contract. Either we must dismiss the conception of agreement from these cases and place them on the broad ground adopted by Willes, J., in *Skelton v. L. & N.W. Railway Co.*,^d "If a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it"; or else we must follow the analogy of the contract *mandatum*. In that contract no liability was created until the service asked for was entered upon; thenceforward the one party was bound to use reasonable care in performance, the other was bound to indemnify against loss incurred in doing the service. Such liabilities, reasonable enough in themselves, are difficult to reconcile with a logical use of the

^a *Elsee v. Gatward*, (1793) 5 T.R. 143.

^b *Wilkinson v. Coverdale*, (1793) 1 Esp. 75.

^c See Holdsworth, *History of English Law*, vol. iii, 330.

^d (1867) L.R. 2 C.P. 636.

¹ *Baxter & Co. v. Jones*, (1903) 6 Ont. L.R. 360 (agent liable for misfeasance).

² *Thorne v. Deas*, (1809, N.Y.) 4 Johns. 84; *McCauley v. Davidson*, (1865) 10 Minn. 418; *Melbourne &c. R. v. Louisville &c. R.*, (1889) 88 Ala. 443; *Preston v. Prather*, (1891) 137 U.S. 604; *Isham v. Post*, (1894) 141 N.Y. 100; *Swentzel v. Penn Bank*, (1892) 147 Pa. 140.

English doctrine of consideration; and they may well be exceptions to its universal application in contract.¹

(c) *Third test of sufficiency of consideration*

136. Does the promisee do, forbear, suffer or promise more than that to which he is legally bound? If the promisor gets nothing in return for his promise but that to which he is already legally entitled, the consideration is not sufficient.²

137. *Performance of public duty.* This may occur where the promisee is under a public duty to do that which he promises to do. Where a witness has received a subpoena to appear at a trial, a promise to pay him anything beyond his expenses is based on no consideration; for the witness is bound to appear and give evidence.^{a 3}

But where a police-constable who sued for a reward offered for the supply of information, leading to a conviction, had rendered services outside the scope of his ordinary duties, he was held entitled to recover.^{b 4}

On the same principle a promise not to do what a man legally cannot do is an unreal consideration. The case of *Wade v. Simeon*,^c cited in discussing forbearance as a consideration, is a sufficient illustration of this point.

138. *Promise to perform existing contract.* Again, we find insufficiency of consideration where the promisee undertakes to fulfill the conditions of an existing contract.⁵

^a *Collins v. Godefroy*, (1831) 1 B. & A. 950.

^b *England v. Davidson*, (1840) 11 A. & E. 856.

^c (1846) 2 C.B. 548.

¹ See Beale, "Gratuitous Undertakings," 5 *Harvard Law Review*, 222.

² *Tolhurst v. Powers*, (1892) 133 N.Y. 460; *Smith v. Whildin*, (1848) 10 Pa. 39; *Hogan v. Stophlet*, (1899) 179 Ill. 150; *Foley v. Platt*, (1895) 105 Mich. 635.

³ *Dodge v. Stiles*, (1857) 26 Conn. 463. But a promise to pay an expert a large sum for investigating and then testifying is enforceable. *Barrus v. Phaneuf*, (1896) 166 Mass. 123; 32 L.R.A. 619.

⁴ *Bronnenberg v. Coburn*, (1886) 110 Ind. 169; *Studley v. Ballard*, (1897) 169 Mass. 295; *McCandless v. Alleghany &c. Co.*, (1893) 152 Pa. 139.

⁵ Where *A* and *B* have an enforceable contract which *A* refuses to perform, and *B* promises *A* an additional sum to perform it, or to promise to perform it, the decisions may be classified as follows: (1) It is generally held that *B*'s promise is without consideration in that *A* is simply doing or promising to do what he is already legally bound to do. *Lingenfelder v. Wainwright Brewing Co.*, (1890) 103 Mo. 578; *Main Street Co. v. Los Angeles Co.*, (1900) 129 Cal. 301; *Goldsborough v. Gable*, (1892) 140 Ill. 269; *McCarty v. Hampton Building Ass'n*, (1883) 61 Iowa, 287; *Runkle v. Kettering*, (1905) 127 Iowa, 6; *Esterly Co. v. Pringle*, (1894) 41 Neb. 265; *Vanderbilt v. Schreyer*, (1883) 91 N.Y. 392 (but see N.Y. cases below);

In the course of a voyage from London to the Baltic and back two seamen deserted, and the captain, being unable to supply their place, promised the rest of the crew that if they would work the vessel home the wages of the two deserters should be divided amongst them. The promise was held not to be binding.

"The agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. . . . The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to bring the ship in safety to her destined port."^a

^a *Stilk v. Myrick*, (1809) 2 Camp. 317.

Carpenter v. Taylor, (1900) 164 N.Y. 171, 177; *Jughardt v. Reynolds*, (1902) 68 N.Y. App. Div. 171; *Erb v. Brown*, (1871) 69 Pa. 216; *Gaar v. Green*, (1896) 6 N.Dak. 48; *Alaska &c. Ass'n v. Domenico*, (1902) 117 Fed. 99. (2) Some cases hold that the forming of the new contract is evidence that the parties mutually agree to rescind the old one and extinguish the right of action for its breach, and the new contract therefore stands as if no previous one had been made. In most of these cases there was in fact no such antecedent agreement to rescind. *Coyner v. Lynde*, (1858) 10 Ind. 282 [but see *Reynolds v. Nugent*, (1865) 25 Ind. 328]; *Connolly v. Devoe*, (1871) 37 Conn. 570; *Munroe v. Perkins*, (1830, Mass.) 9 Pick. 298 [cf. *Parrot v. Mexican C.R. Co.*, (1911) 211 Mass. 184, 194]; *Rogers v. Rogers*, (1885) 139 Mass. 440; *Lattimore v. Harsen*, (1817, N.Y.) 14 Johns. 330; *Stewart v. Keteltas*, (1867) 36 N.Y. 388 (but see N.Y. cases cited above); *Moore v. Detroit Locomotive Works*, (1866) 14 Mich. 266; *Goebel v. Linn*, (1882) 47 Mich. 489 [but see *Widiman v. Brown*, (1890) 83 Mich. 241]; *Lawrence v. Davey*, (1856) 28 Vt. 264. Some courts admit this doctrine only in case there is some unforeseen difficulty or hardship in the first contract. *Lins v. Schuck*, (1907) 106 Md. 220; *King v. Duluth &c. Ry.*, (1896) 61 Minn. 482; *Osborne v. O'Reilly*, (1887) 42 N.J. Eq. 467. (3) At least one case has treated the new contract as an attempt to mitigate the damages from the breach of the first, and apparently regarded both contracts as enforceable, much as if the new contract had been made with another party. *Endriss v. Belle Isle Co.*, (1882) 49 Mich. 279.

If a debt is due and the creditor agrees to extend the time for payment on consideration that the debtor will not pay until that time has elapsed and will pay interest at the same rate the debt already bears, some courts hold that the promise to extend the time rests upon a sufficient consideration. *Fowler v. Brooks*, (1842) 13 N.H. 240; *Chute v. Pattee*, (1854) 27 Me. 102; *Fawcett v. Freshwater*, (1877) 31 Ohio St. 637; *Simpson v. Evans*, (1890) 44 Minn. 419. *Contra*: *Olmstead v. Latimer*, (1899) 158 N.Y. 313; *Wilson v. Powers*, (1881) 130 Mass. 127; *Dare v. Hall*, (1880) 70 Ind. 545.

¹ *Accord*: *Bartlett v. Wyman*, (1817, N.Y.) 14 Johns. 260 (crew by threats of desertion compelled master to promise higher wages). But see *contra*, *Lattimore v. Harsen*, (1817, N.Y.) 14 Johns. 330 (one under bond with penalty to open roadway promised additional compensation not to abandon existing contract).

But the decision would have been otherwise if un contemplated risks had arisen.^{a 1} There is in the contract into which a seaman usually enters, an implied condition that the ship should be seaworthy. So where a seaman had signed articles of agreement to help navigate a vessel home from the Falkland Isles, and the vessel proved to be unseaworthy, a promise of extra reward to induce him to abide by his agreement was held to be binding.^{b 2}

139. Performance of existing contract. The actual performance of that which a man is legally bound to do, stands on the same footing as his promise to do that which he is legally compellable to do.³ This rule seems a logical deduction from the doctrine of consideration, but some applications of it have met with severe criticism.

140. Same. The payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt.^{c 4} Such payment is

^a Hartley v. Ponsonby, (1857) 7 E. & B. 872.

^b Turner v. Owen, (1862) 3 F. & F. 176.

^c It is strange that this rule should still be spoken of as the rule in *Cumber v. Wane*, (1721) 1 Sm. L.C. 325, (11th ed.). In that case it was held that a promissory note for £5 was no satisfaction for a debt of £15, not because there was no consideration (for a negotiable instrument was given for a debt) but because the satisfaction was inadequate. Such a decision would hardly be supported now.

¹ See *King v. Duluth &c. Ry.*, (1895) 61 Minn. 482.

² If under a contract one has an alternative or option and gives this up for a new promise, there is a sufficient consideration. *Thomson v. Way*, (1899) 172 Mass. 423.

³ *Parmelee v. Thompson*, (1871) 45 N.Y. 58 (payment of costs of a suit on a note is no consideration for promise to extend the time for payment of the note); *Warren v. Hodge*, (1876) 121 Mass. 106 (payment of part of a debt is no consideration for promise to extend the time for the payment of the balance); *Robinson v. Jewett*, (1889) 116 N.Y. 40; *Dow v. Syracuse &c. R.*, (1903) 81 N.Y. App. Div. 362; *Eastman v. Miller*, (1901) 113 Iowa, 404.

⁴ This rule was finally established for England (rather regretfully it would seem) by the decision of the House of Lords in *Foakes v. Beer*, (1884) 9 App. Cas. 605. It was apparently unknown to that court that in a case on all fours with *Foakes v. Beer*, *Reynold v. Purchase*, (1595) Moore, K.B. 412; s.c. Cro. Elis. 429; 1 Rolle Ab. 28, it had been held that a part payment of an existing debt was a sufficient consideration for a promise not to levy execution for the balance. Although it was not a discharge of the debt (*Pinnel's Case*, 5 Co. Rep. 117a), it was a sufficient consideration for a promise. That this opinion was held by the great Sir Edward Coke, C.J., was also unknown to the House of Lords. See *Bagge v. Slade*, (1616) 3 Bulst. 162.

The prevailing rule in the United States is the same as that in England. *Bender v. Been*, (1889) 78 Iowa, 283; *Hoidale v. Wood*, (1904) 93 Minn. 190. See 1 Cyc. 319, note 94. The most recent cases are collected in L.R.A. 1917 A, 716, 719. It is changed by statute in some states. 1 Cyc. 322. And by judicial decision in two states. *Clayton v. Clark*, (1896) 74 Miss. 499; *Frye v. Hubbell*, (1907) 74 N.H. 358. And in one or more where a written receipt

no more than a man is already bound to do, and is no consideration for a promise, express or implied, to forego the residue of the debt. The thing done or given must be somehow different to that which the recipient is entitled to demand, in order to support his promise. The fact that the difference is slight will not destroy its efficacy in constituting a consideration, for if the courts inquired whether the thing done in return for a promise was sufficiently unlike that to which the promisor was already bound, they would inquire into the adequacy of the consideration. Thus, the giving a negotiable instrument (such as a cheque) for a money debt, or "the gift of a horse, a hawk or a robe, in satisfaction, is good. For it shall be intended that a horse, a hawk or a robe might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction."^{a 1}

It would hardly seem open to doubt that a promise, not under seal, to forego legal rights, must needs depend for its validity upon the rules common to all promises. But the general rule is subject to some variations of detail in cases where the promise is made *before* the contract is broken and when it is made *after*.

Contract executory. If a contract is wholly executory, and the legal duties of the parties are as yet unfulfilled, it can be discharged by mutual consent, the acquittance of each from the other's claims being the consideration for the promise of each to waive his own.²

Contract executed. A contract in which A, one of the parties, has done his part, and X, the other, remains liable, cannot (save in the exceptional cases of bills of exchange or promissory notes) be discharged by mere consent, but it may be discharged

^a Pinnel's case, (1602) 5 Co. Rep. 117.

in full is given. 1 Cyc. 322; *Dreyfus v. Roberts*, (1905) 75 Ark. 354; *Johnson v. Cooke*, (1912) 85 Conn. 679 (*semble*); note in 27 L.R.A. (N.S.) 439; 20 L.R.A. 787. Payment of a smaller sum by a third party is sufficient. *Clark v. Abbott*, (1893) 53 Minn. 88; note in 23 L.R.A. 120. For further cases and statutes, see *Williston*, 27 *Harvard Law Review*, 513, note 24.

¹ *Jaffray v. Davis*, (1891) 124 N.Y. 164. But giving a promissory note for part of a debt was held insufficient to support a promise to release the balance in *Shanley v. Koehler*, (1903) 80 N.Y. App. Div. 566, *aff'd* 178 N.Y. 556. See also *Arend v. Smith*, (1897) 151 N.Y. 502. A payment of 30 cents on the dollar and forbearance to go into voluntary bankruptcy was held sufficient in *Melroy v. Kemmerer*, (1907) 218 Pa. 381, 11 L.R.A. (N.S.) 1018 and note.

² *Cutter v. Cochrane*, (1874) 116 Mass. 408. See § 412, *post*.

by the substitution of a new agreement.^a *A* has supplied *X* with goods according to a contract. *X* owes *A* the price of the goods. If *A* waives his claim for the money, where is the consideration for his promise to waive it? If *A* and *X* substitute a new agreement, to the effect that *X* on paying half the price shall be exonerated from paying the remainder, where is the consideration for *A*'s promise to forego the payment of half the sum due to him? The new agreement needs consideration: there must be some benefit to *A* or detriment to *X* in return for *A*'s promise. Detriment to *X* there can be none in paying half of a sum the whole of which he may at any time be compelled to pay; and benefit to *A* there can be none in receiving a portion of a sum the payment of which he can at any time compel.¹ Unless *A* receives something different in kind, a chattel, or a negotiable instrument, or a fixed for an uncertain sum, his promise is gratuitous and must be made under seal.^{b 2}

Contract broken. We now come to cases where the contract is broken and a promise made to forego the right arising from the breach.

Where the right itself is in dispute the suit may be compromised as already described.³

Where the right is undisputed, the amount due may be uncertain or certain.

If it is uncertain, the payment of a liquidated or certain sum would be consideration for foregoing a claim for a larger though uncertain amount.^{c 4}

If it is certain, the promise to forego the claim or any portion

^a *Foster v. Dawber*, (1851) 6 Ex. 839. See §§ 411-17, *post*.

^b *Goddard v. O'Brien*, (1882) 9 Q.B.D. 37. ^c *Wilkinson v. Byers*, (1834) 1 A. & E. 106.

¹ This is hardly true, as a matter of fact, as Lord Blackburn admitted in *Foakes v. Beer*, (1884) 9 App. Cas. 605. The part payment is in fact both a detriment to the debtor, in that he parts with money that he might lawfully have used otherwise, and a benefit to the creditor, in that he receives money. If the courts refuse to recognize this as consideration, as they generally do, it must be on some principle of general public policy.

² *Collyer v. Moulton*, (1868) 9 R.I. 90.

³ *Russell v. Cook*, (1842, N.Y.) 3 Hill, 504; *Wahl v. Barnum*, (1889) 116 N.Y. 87.

⁴ *Nassoiy v. Tomlinson*, (1896) 148 N.Y. 326; *Fuller v. Kemp*, (1893) 138 N.Y. 231, s.c. 20 L.R.A. 785, where in a note will be found a large collection of cases on payment of a smaller sum in discharge of a larger.

The payment of a sum admittedly due, is no consideration for a promise to accept it as a full satisfaction of another claim for a disputed amount. *Mance v. Hossington*, (1912) 205 N.Y. 33; *Demeules v. Jewel Tea Co.*, (1908) 103 Minn. 150, 14 L.R.A. (N.S.) 954. Cf. *Tanner v. Merrill*, (1895) 103 Mich. 58; *Fuller v. Smith*, (1910) 107 Me. 161.

of it can only be supported by the giving of something different in kind, or by a payment at an earlier date or in different manner to that agreed on.¹

And it is important to notice that whether the sum due is of certain or uncertain amount the consideration for the promise to forego must be *executed*. The parties must not only have agreed, but their agreement must be carried out if it is to be an answer to the original cause of action. Where it has been carried out it is an *accord and satisfaction*, where it has not been carried out it is an *accord executory*. As is said in an old case, "*accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent.*"²

Some denunciation and some ridicule have been expended on the rule that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt.³ And yet, as was said in a judgment in which the House of Lords recently affirmed the rule, "it is not really unreasonable, or practically inconvenient, that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation."⁴

There seems to be no difference between a promise by A to X to give him £45 on demand, and a promise by A to X to excuse him £45 out of £50 then due. If consideration is needed in the one case, it is needed in the other, and there can be no reason why the law should favor a man who is excused money which he ought to pay, more than a man who is promised money which he has not earned.⁵

^a *Lyna v. Bruce*, (1794) 2 H. Bl. 319.

^b *Foakes v. Beer*, (1884) 9 App. Cas. 606.

¹ *Jaffray v. Davis*, (1891) 124 N.Y. 164; *Church v. Spicer*, (1912) 85 Conn. 579; *Kidder v. Kidder*, (1859) 33 Pa. 268. Cf. *Price v. McEachern*, (1914) 111 Me. 573. For instances of new consideration, see 1 Cyc. 323-29.

² See *Kromer v. Heim*, (1879) 75 N.Y. 574. See § 431, *post*.

³ See Ames, "Two Theories of Consideration," 12 *Harvard Law Review* at p. 525. In *Couldery v. Bartrum*, (1881) 19 Ch. D. 399, it was said by Sir George Jessel that according to English law "a creditor might accept anything in satisfaction of a debt except a less amount of money. He might take a horse or a canary or a tomcat if he chose and that was accord and satisfaction; but by a most extraordinary peculiarity of English law he could not take 19s. 6d. in the pound."

⁴ But the question in dispute is whether or not the promise is in fact gratuitous.

⁵ For a case escaping the rule on the theory of gift, see *Gray v. Barton*, (1873) 55 N.Y. 68.

There is a distinction between a discharge — which is the extinguishment of a pre-existing right; and a promise — which is the creation of a new duty. The courts seem now to be making about the same requirement for both, in respect of consideration; but there are some cases where the requirement was held not to be identical. See *post*, §§ 411-18.

141. Composition with creditors. A composition with creditors appears at first sight to be an infraction of the rule, inasmuch as each creditor undertakes to accept a less sum than is due to him in satisfaction of a greater. But the promise to pay, or the payment of a portion of the debt, is not the consideration upon which the creditor renounces the residue. That this is so is apparent from the case of *Fitch v. Sutton*.^a There the defendant, a debtor, compounded with his creditors and paid them 7s. in the pound; he promised the plaintiff, who was one of the creditors, that he would pay him the residue when he could; but the plaintiff nevertheless gave him a receipt of all claims which he might have against him "from the beginning of the world to that day." The plaintiff subsequently brought an action for the residue of his claim; the defendant pleaded the acceptance of 7s. in the pound in full of all demands: but Lord Ellenborough said:

"It is impossible to contend that acceptance of £17 10s. is an extinguishment of a debt of £50. There must be some consideration for a relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*."

The consideration in a composition with creditors must therefore be something other than the mere acceptance of a smaller sum in satisfaction of a larger: it is the substitution of a new agreement with new parties and a new consideration.

The common law on this point (apart from the various Bankruptcy Acts) was settled in the case of *Good v. Cheesman*.^b There the defendant, a debtor who had compounded with his creditors, successfully set up as against an individual creditor suing for the whole of his debt, not a separate promise by that creditor to forego the residue, but a composition made with all the creditors. The consideration which supported each creditor's promise to accept a lesser sum in satisfaction of a greater was thus stated by Parke, J.:

"Here each creditor entered into a new agreement with the defendant (the debtor), the consideration of which, to the creditor, was a forbearance by all the other creditors, who were parties, to insist upon their claims."^c

It is not the payment of a portion of the debt, which forms the consideration in the case of a composition with creditors,

^a (1804) 5 East. 230.

^c *Good v. Cheesman*, (1831) 2 B. & Ad. 335.

^b (1831) 2 B. & Ad. 328.

but the substitution of a new agreement with different parties for a previous debt.¹

The composition with creditors is therefore no exception to the general rule; creditor *X* not merely gets payment of 10s. in the pound from his debtor *A*, but the benefit of a promise procured by *A* from creditors *Y* and *Z* that they too will be content with a payment of 10s. in the pound.²

142. [Mutual subscriptions to a charity.]³

¹ *Boyd v. Hind*, (1857) 1 H. & N. 938. *Slater v. Jones*, (1873) L.R. 8 Ex. at p. 193.

² *Williams v. Carrington*, (1857, N.Y.) 1 Hilt. 515; *Perkins v. Lockwood*, (1868) 100 Mass. 249; *Brown v. Farnham*, (1892) 48 Minn. 317.

³ There are several possible views of the grounds for enforcing a composition with creditors. (1) That the consideration moves from the debtor, and consists in his procuring the promises of the other creditors. This is the view of the author. It is open to the objection that it is not always the case that the debtor procures these promises. The composition would be equally binding if the creditors first agreed among themselves and the debtor accepted their offer. (2) That the creditors mutually promise each other for the benefit of the debtor, the consideration moving from each creditor and consisting in the detriment he suffers in taking less than he is entitled to, relying on the promises of the other creditors to do the same. This view could not be pressed in jurisdictions where a stranger to the consideration cannot enforce the promise. See *ante*, § 128. (3) That the promises are enforced on the ground of estoppel, since it would be a fraud on the other creditors to permit one to recover more than he has agreed to take when they have taken less than they are entitled to, relying on his promise to do the same. Metcalf on Cont., p. 192. Sometimes one, and often all, of these reasons are assigned. *Perkins v. Lockwood*, (1868) 100 Mass. 249; *Williams v. Carrington*, (1857, N.Y.) 1 Hilt. 515; *Murray v. Snow*, (1873) 37 Iowa, 410. (4) It may be suggested further that the promise of the debtor to pay all the creditors pro rata involves at least the temporary surrender of his common-law privilege of preferring one creditor over another. See Ames, 12 *Harvard Law Review*, 526-28.

⁴ *Mutual subscriptions*. An analogous problem arises in the case of mutual promises to subscribe money to a charitable object. Divergent views are taken of this problem. (1) If the subscription is in effect an offer to pay in case the promisee will do certain things, as procure additional subscriptions up to a fixed amount [*Roberts v. Cobb*, (1886) 103 N.Y. 600], or procure subscriptions and an effective charter for a college [*Keuka College v. Ray*, (1901) 167 N.Y. 96], the doing of the act is a sufficient consideration to support the promise. *Sherwin v. Fletcher*, (1897) 168 Mass. 413. The request need not be expressed; it may be implied. *Keuka College v. Ray*, *supra*. Hence in many cases the subscription is enforced if the promisee has entered upon the work or incurred liabilities on the faith of the subscriptions. *Beatty v. Western College*, (1898) 177 Ill. 280; *First M. E. Church v. Donnell*, (1899) 110 Iowa, 5; *Albert Lea College v. Brown*, (1903) 88 Minn. 524; *Hodges v. Nalty*, (1899) 104 Wis. 464; *Irwin v. Lombard Univ.*, (1887) 58 Ohio St. 9. This sometimes becomes a kind of estoppel contract like that in *Ricketts v. Scothorn*, (1898) 57 Neb. 51. See *Beatty v. Western College*, *supra*. But if no act be done or liability incurred on the faith of a subscription, it may be revoked, and it is revoked by the death of the subscriber.

143. Promise to perform contract with third party. It is not difficult to see that consideration is insufficient if it consist in a promise given to perform a public duty, to perform a contract already made with the promisor, or to discharge an existing liability. It is harder to answer the question whether the performance or promise to perform an existing contract with a third party is a legally operative consideration.¹

We must note two cases dealing with this form of consideration.

In *Shadwell v. Shadwell*^a the plaintiff had promised to marry X: his uncle promised him in writing that if he married X he should receive £150 a year during the uncle's lifetime. He married X; the annuity fell into arrear; the uncle died, and the plaintiff sued his executors. The court differed as to the existence of a consideration for the uncle's promise. Erle, C.J., and Keating, J., inclined to regard it as the offer of a promise capable of becoming a binding contract when the marriage took place. Byles, J., dissented, holding that the plaintiff had done no more than he was legally bound to do, and that his

^a (1860) 9 C.B. (N.S.) 159.

Pratt v. Trustees, (1879) 93 Ill. 475; *Presbyterian Church v. Cooper*, (1889) 112 N.Y. 517; *Cottage St. Church v. Kendall*, (1877) 121 Mass. 528. (2) It is held in some jurisdictions that the acceptance of the subscription by the trustees of the charity implies a promise on their part to execute the work contemplated, and this supports the subscriptions. *Trustees v. Haskell*, (1882) 73 Me. 140; *Collier v. Baptist Ed. Soc.*, (1848, Ky.) 8 B. Mon. 68; *Helfenstein's Estate*, (1875) 77 Pa. 328; *Superior Land Co. v. Bickford*, (1896) 93 Wis. 220; *Martin v. Meles*, (1901) 179 Mass. 114. (3) A few jurisdictions hold that the promises of the subscribers mutually support each other. This view implies that a stranger to the consideration may enforce the promise. *Higert v. Indiana Asbury Univ.*, (1876) 53 Ind. 326; *Christian College v. Hendley*, (1875) 49 Cal. 347; *Edinboro Acad. v. Robinson*, (1860) 37 Pa. 210; *Lathrop v. Knapp*, (1870) 27 Wis. 214; *Irwin v. Lombard University*, (1887) 56 Ohio St. 9 (*semble*); *Allen v. Duffie*, (1880) 43 Mich. 1. It is pointed out in *Martin v. Meles*, (1901) 179 Mass. 114, that while the theory of mutual-promise consideration is generally rejected in these cases, it still prevails in the case of composition of creditors.

Mutual subscriptions for a business purpose, as contrasted with a charitable purpose, may be distinguished; in such cases there is usually some valuable consideration moving to the subscriber. *Martin v. Meles*, (1901) 179 Mass. 114; *Davis v. Campbell*, (1895) 93 Iowa, 524. So also in case of mutual promises among dealers as to the conduct of their business. *Stovall v. McCutchen*, (1900) 107 Ky. 577. But see *New Orleans &c. Ass'n v. Magnier*, (1861) 16 La. Ann. 338.

¹ See Williston, 8 *Harvard Law Review*, 32-38; 27 *ibid.* 503; Ames, 12 *ibid.* 519-521; Beale, 17 *ibid.* 71; Corbin, "Does a Pre-existing Duty Defeat Consideration," (1918) 27 *Yale Law Journal*, 362.

marriage was therefore no consideration for the uncle's promise.⁶¹

In *Scotson v. Pegg*,⁶² Scotson promised to deliver² to Pegg a cargo of coal then on board a ship belonging to Scotson, and Pegg promised in return to unload it at a certain rate of speed. This he failed to do, and when sued for breach of his promise, pleaded that Scotson was under contract to deliver the coals to X or to X's order, and that X had made an order in favor of Pegg. Scotson therefore in promising to deliver the coals promised no more than he was bound to perform under his contract with X, and Pegg alleged that there was no consideration for his promise to unload speedily.

The court held that Pegg was liable, since it was not inconsistent with the pleading that there might have been some dispute as to Pegg's right to the coals, or some claim upon them foregone by Scotson: but Wilde, B., said, "If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding."³

In both these cases we can reconcile the decisions with the doctrine of consideration, but not the reasons given for the decisions.

In *Shadwell v. Shadwell* the original contract was executory; the nephew and M, to whom he was engaged, might have put an end to it by a mutual waiver of their respective promises. The nephew, at the request of his uncle, abandoned, or agreed

⁶¹ In other cases where there is a promise to pay money in consideration of a marriage taking place, the promise is a part of the engagement to marry, as in *Synge v. Synge*, [1894] 1 Q.B. 406, or an inducement to the engagement, as in *Hammersley v. de Biel*, (1845) 12 Cl. & F. 62, or is made in consideration of an immediate fulfillment of the promise, as in *Shute v. Silberbeer*, (1895) 11 T.L.R. 491.

⁶² (1861) 6 H. & N. 295.

¹ For a case almost exactly parallel to *Shadwell v. Shadwell* in its facts, and decided the same way, see *DeCioco v. Schweizer*, (1917, N.Y.) 117 N.E. 807, discussed at length in 27 *Yale Law Journal*, 362.

² The declaration seems to have alleged *delivery*, and not a *promise* to deliver, as the consideration.

³ This case is followed in *Abbott v. Doane*, (1895) 163 Mass. 433, where the contract appears to have been bilateral. In *Manetti v. Doege*, (1900) 48 N.Y. App. Div. 567, the promise is held enforceable if the promisor receives a benefit from performance; but this is perhaps contrary to *Arend v. Smith*, (1897) 151 N.Y. 502. These cases also tend to support the doctrine: *Merrick v. Giddings*, (1882, D.C.) 1 Mackey, 394; *Champlain Co. v. O'Brien*, (1902) 117 Fed. 271; *Donnelly v. Newbold*, (1901) 94 Md. 220; *Day v. Gardner*, (1886) 42 N.J. Eq. 199; *Humes v. Land Co.*, (1893) 98 Ala. 461, 473, distinguishing *Johnson v. Sellers*, (1858) 33 Ala. 265.

to abandon, a power which he might have exercised in concurrence with *M*; and the abandonment of a power has always been held to be consideration for a promise.¹

In *Scotson v. Pegg* the court clearly thought that the promise to deliver coals to the defendant might have been something more than a mere performance of an existing promise to a third party; that there might have been a right waived or claim foregone which did not appear on the pleadings.² So far the decisions are consistent with principle, but there are *dicta* which seem to show that two judges in the first case, and Baron Wilde in the second, thought that a promise given in consideration of the performance or promise to perform a contract with a third party was binding.

Whether the promise is conditional on the performance of the contract made with the third party, or whether it is given in return for a promise to perform, does not seem to make any difference in principle. If we say that the consideration is the detriment to the promisee in exposing himself to two suits instead of one for the breach of contract we beg the question, for we assume that an action would lie on such a promise.³ If we say that the consideration is the fulfillment of the promisor's

¹ If there was a valid bilateral engagement between the nephew and Ellen Nichol, the only *rights* possessed by the former were a right against Ellen that she should marry him as agreed and an indefinite number of rights against third persons that they should not interfere with Ellen's performance as agreed. The nephew *abandoned* none of these rights. In addition to these rights, he had also the *privilege* of making an offer of rescission to Ellen and the legal *power* of creating in Ellen the power of rescission by making such an offer. Prior to his actual marriage to Ellen, he abandoned neither the privilege nor the power, although he *forbore from acting* in accordance with them. By the actual marriage, however, he utterly destroyed this legal *power*, for an offer of rescission subsequently made would be void of legal effect. The nephew also had the legal *power* of *breaking* his contract with Ellen, thereby substituting a secondary obligation for the primary one. The forbearance to act in accordance with this power is also a detriment and would be a sufficient consideration in itself, except for the fact that he was not, as to Ellen, legally privileged to break the contract. For a further discussion, see Arthur L. Corbin, "Does a Pre-existing Duty Defeat Consideration?" (1918) 27 *Yale Law Journal*, 362.

² Of course, no promise ought to be enforced merely because there *might* have been a consideration that is not alleged and proved.

³ It does, indeed, beg the question to say that a promise is a detriment because it creates a new legal duty, and then to say that there is a new legal duty because a promise is a detriment. This is true in the case of all bilateral contracts. See Williston, 8 *Harvard Law Review*, 29. Bilateral contracts are enforceable because social custom and court decisions have long so decreed. The "detriment" theory of consideration should not be applied to them. See *ante*, § 124, and note.

and he by his acceptance becomes bound to pay a reasonable price for them.¹ "If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."^a So in *Hart v. Mills* the defendant had ordered four dozen of wine and the plaintiff sent eight, the defendant retained thirteen bottles and sent back the rest, and the plaintiff sued him on the original contract for the purchase of four dozen. It was held that the retention of thirteen bottles was not an acquiescence in the misperformance of the original contract, but a new contract arising upon the acceptance of goods tendered, and that the plaintiff could only recover for thirteen bottles. "The defendant orders two dozen of each wine and you send four: then he had a right to send back all; he sends back part. What is it but a new contract as to the part he keeps?"^b

It must, however, be borne in mind that where the person to whom such an offer is made has no opportunity of accepting or rejecting the things offered, an acceptance to which he cannot assent will not bind him. The case of *Taylor v. Laird*,^c already cited, illustrates this proposition. The difficulty which would arise, should such an enforced acceptance create a legal duty, is forcibly stated by Pollock, C.B.: "Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"^d

Offer of a promise for an act. The "consideration executed upon request," or the contract which arises on the acceptance by act of the offer of a promise, is best illustrated by the case of an advertisement of a reward for services which becomes a promise to give the reward when the service is rendered. In such cases it is not the offeror, but the acceptor, who has done his part at the moment when he enters into the contract. If A makes a general offer of reward for information and X supplies the information, A's offer is turned into a promise by the

^a Per Tindal, C.J., in *Hoodley v. McLaine*, (1834) 10 Bing. 482.

^b *Hart v. Mills*, (1846) 15 M. & W. 87.

^c (1856) 25 L.J. Exch. 329.

¹ *Fogg v. Portsmouth Athenæum*, (1862) 44 N.H. 115.

² *Bowker v. Hoyt*, (1836, Mass.) 18 Pick. 555. The duty here created should be classified not as contract but as quasi-contract.

³ *Bartholomew v. Jackson*, (1822, N.Y.) 20 Johns. 28. Under some circumstances, however, the law should and does create a quasi-contractual duty to pay for value received.

act of *X*, and *X* simultaneously concludes the contract and performs his part of it.^{a 1}

And this form of consideration will support an implied as well as an express promise where a man is asked to do some service which will entail risk or expense. The request for such services embodies or implies a promise, which becomes binding when liabilities or expenses are incurred. A lady employed an auctioneer to sell her estate; he was compelled in the course of the proceedings to pay certain duties to the Crown, and it was held that the fact of employment implied a promise to indemnify for money paid in the course of the employment. "Whether the request be direct, as where the party is expressly desired by the defendant to pay; or indirect, as where he is placed by him under a liability to pay, and *does pay*, makes no difference."^{b 2}

It is probably on this principle, the implication of a promise in a request, that the case of *Lampleigh v. Braithwaite*^c is capable of explanation. If so, we do not need the theory with which I shall have to deal presently in discussing that case.

148. A past consideration will not support a promise. It remains to distinguish executed from past consideration. A past consideration is, in effect, no consideration at all; that is to say, it confers no benefit on the promisor, and involves no detriment to the promisee in respect of his promise. It is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives it matters not, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive and not upon consideration.^d

A purchased a horse from *X*, who afterwards, in considera-

^a *England v. Davidson*, (1840) 11 A. & E. 856.

^b *Brittain v. Lloyd*, (1845) 14 M. & W. 762.

^c (1615) 1 Sm. L.C. 141, Hob. 106.

¹ *Reif v. Paige*, (1892) 55 Wis. 496; *Cummings v. Gaan*, (1866) 52 Pa. 484; *Wentworth v. Day*, (1841, Mass.) 3 Metc. 352. The act of *X* is the exercise of the power conferred upon him by *A*'s offer. See *ante*, §§ 37a, 38.

² It may frequently make the difference between contract and quasi-contract. However, the duty to be performed — the *debt* — is no doubt the same in either case.

^d *Dearborn v. Bowman*, (1841) 3 Metc. (Mass.) 155; *Mills v. Wyman*, (1825) 3 Pick. (Mass.) 207; *Allen v. Bryson*, (1885) 67 Iowa 591; *Freeman v. Robinson*, (1876) 38 N.J. L. 383; *Shepard v. Rhodes*, (1863) 7 R.I. 470; *Barker v. Thayer*, (1914) 217 Mass. 13. See § 127, *ante*; also § 145, *note*.

tion of the previous sale, promised that the horse was sound and free from vice. It was in fact a vicious horse. The court held that the sale created no implied warranty or promise that the horse was not vicious; that the promise must therefore be regarded as independent of the sale, and as an express promise based upon a previous transaction. It fell therefore "within the general rule that a consideration past and executed will support no other promise than such as would be implied by law."^{a 1}

149. Exceptions. (1) **Consideration moved by previous request.** To the general rule thus laid down certain exceptions are said to exist; they are perhaps fewer and less important than is sometimes supposed.

A past consideration will, it is sometimes said, support a subsequent promise, if the consideration was given at the request of the promisor.

In *Lampleigh v. Braithwait*,^b which is regarded as the leading case upon this subject, the plaintiff sued the defendant for £120 which the defendant had promised to pay to him in consideration of services rendered at his request. The court here agreed that a mere voluntary courtesy will not have consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit* it will bind; "for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit."²

^a *Rosecris v. Thomas*, (1842) 3 Q.B. 234. ^b (1615) Hobart, 105; and see 1 Sm. L.C. 141.

¹ *Bloss v. Kittridge*, (1833) 5 Vt. 28; *Summers v. Vaughan*, (1871) 35 Ind. 323; *Morehouse v. Comstock*, (1877) 42 Wis. 626; *Aultman v. Kennedy*, (1885) 33 Minn. 339; *Chamberlin v. Whitford*, (1869) 102 Mass. 448.

² Some American cases follow *Lampleigh v. Braithwait* where there was an express previous request. *Stuht v. Sweesy*, (1896) 48 Neb. 767; *Pool v. Horner*, (1885) 64 Md. 131; *Paul v. Stackhouse*, (1861) 38 Pa. 302; *Sutch's Estate*, (1902) 201 Pa. 305; *Silverthorn v. Wylie*, (1897) 96 Wis. 69; *Raibe v. Gorrell*, (1900) 105 Wis. 636. Some go further and infer from the subsequent promise that there was a previous request where the consideration or benefit moved directly from the promisee to the promisor. *Hicks v. Burhans*, (1813, N.Y.) 10 Johns. 242; *Jilson v. Gilbert*, (1870) 26 Wis. 637; *Hatch v. Purcell*, (1850) 21 N.H. 544; *Wilson v. Edmonds*, (1852) 24 N.H. 517; *Montgomery v. Downey*, (1902) 116 Iowa, 632; *Boothe v. Fitzpatrick*, (1864) 36 Vt. 681; *Seymour v. Marlboro*, (1868) 40 Vt. 171; *Landis v. Royer*, (1868) 59 Pa. 95. But other cases hold that if the services were intended to be gratuitous so that no implied promise would be raised, an express subsequent promise is without consideration. *Allen v. Bryson*, (1885) 67 Iowa, 591; *Chamberlin v. Whitford*, (1869) 102 Mass. 448; *Johnson v. Kimball* (1899) 172 Mass. 398; *Moore v. Elmer*, (1901) 180 Mass. 15; *Stoneburner v. Motley*, (1898) 95 Va. 784. See 53 L.R.A. 353, note. And see § 127, *ante*.

The case of *Lampleigh v. Braithwait* was decided in the year 1615, and for some time before and after that decision, cases are to be found which, more or less definitely, support the rule as stated above.^a But from the middle of the seventeenth century until the present time no direct authority can be discovered, except the case of *Bradford v. Roulston*,^b decided in the Irish Court of Exchequer in 1858. The rule is laid down in textbooks, but in the few cases in which it is referred to by the judges the interpretation placed on it in the books is regarded as open to question.

Thus in *Kaye v. Dutton*,^c Tindal, C.J., lays down the rule that "where the consideration is one from which a promise is by law implied" — as for instance where acceptance of services imports a promise to pay for them — "no express promise made in respect of that consideration after it has been executed, and differing from that which is by law implied, can be enforced."

He goes on to say that where consideration given on request is not so given as to import a promise, "it appears to have been held in some instances" that an act done at the request of the party charged is sufficient consideration to render binding a subsequent promise. But on this point he expresses no opinion, nor was it necessary for the purposes of the judgment. The rule is further narrowed by Maule, J., in *Elderton v. Emmens*.^d He says, "An executed consideration will sustain only such a promise as the law will imply"; and this really means that the explicit promise in *Lampleigh v. Braithwait* would only be valid if the law would have implied it anyhow from the words or conduct of the parties.

In *Kennedy v. Brown*,^e Erle, C.J., puts the case of *Lampleigh v. Braithwait* from a modern point of view.

"It was assumed," he says, "that the journeys which the plaintiff performed at the request of the defendant and the other services he rendered would have been sufficient to make any promise binding if it had been connected therewith in one contract: the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably at the present day, such service on such a request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount" (p. 740).

^a See cases collected in the note to *Hunt v. Bate*, (1568) 3 Dyer, 272a.

^b (1858) 8 Ir. C.L. 468. Langdell, 450.

^d (1847) 4 C.B. at p. 496.

^c (1844) 7 M. & Gr. 807.

^e (1863) 13 C.B. (N.S.) 677.

This would seem to be the *ratio decidendi* in *Wilkinson v. Oliveira*,^a where the plaintiff at the defendant's request gave him a letter for the purposes of a lawsuit. The letter proved the defendant's case, by which means he obtained a large sum of money, and he subsequently promised the plaintiff £1,000. Here the plaintiff evidently expected some return for the use of the letter, and the defendant's request for it was, in fact, an offer that if the plaintiff would give him the letter he would pay a sum to be hereafter fixed.¹

Regarded from this point of view the rule which we are discussing is no departure from the general doctrine as to past consideration. Where a request is made which is in substance an offer of a promise upon terms to be afterwards ascertained, and services are rendered in pursuance of that request, a subsequent promise to pay a fixed sum may be regarded as a part of the same transaction, or else as evidence to assist the jury in determining what would be a reasonable sum.

In opposition to this view stands *Bradford v. Roulston*.^b In that case it was expressly held that a past consideration, which had taken the form of the execution of a bill of sale to third parties upon the request of the defendant was good consideration for a subsequent promise by him to answer for their default. The authorities were elaborately reviewed and the rule in *Lampleigh v. Braithwait* was adhered to in its literal sense.²

It is more than doubtful if this Irish decision can now be regarded as good law. Having regard to the judgment in *Kennedy v. Brown*, referred to above, the correct view seems to be that the subsequent promise is only binding when the request, the consideration, and the promise form substantially one transaction, so that the *request* is virtually the offer of a promise, the precise extent of which is hereafter to be ascertained. This view is supported by the language of Bowen, L.J., in a more recent case:

"The fact of a past service raises an implication that at the time it was rendered it was to be paid for, and if it was a service which was

^a (1835) 1 Bing. (N.C.) 490.

^b (1858) 8 Ir. C.L. 468. Langdell, Cont. 450.

¹ This may have been true in fact, but the plaintiff made no such allegation, and this was not the theory upon which the case and other early cases were decided. See especially *Bosden v. Sir John Thinne*, (1603) Yelv. 40, where a later promise was enforced, although the court expressly admitted that "upon the first request only *assumpsit* does not lie."

² See in exact accord, *Bosden v. Sir John Thinne*, (1603) Yelv. 40.

to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered." ^{a 1}

In spite, therefore, of the cases decided between 1568 and 1635, and of *Bradford v. Roulston* (1858), we may say that the rule once supposed to have been laid down in *Lampleigh v. Braithwaite* cannot now be received in such a sense as to form a real exception to the principle that a promise, to be binding, must be made in contemplation of a present or future benefit to the promisor.

150. Exceptions. (2) **Voluntarily doing what another was legally bound to do.** We find it laid down that "where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration thereof, *expressly* promises," he will be bound by such a promise. ^b But it is submitted that the authority for this rule wholly fails in so far as it rests on the cases which are habitually cited in support of it.

The cases all turn upon the liability of parish authorities for medical attendance on paupers who are settled in one parish but resident in another.

Watson v. Turner (1767) ^c was decided on the ground that the moral obligation resting upon overseers of a parish to provide for the poor would support a promise made by them to pay for services previously rendered to a pauper by a medical man.

In *Atkins v. Banwell* (1802) ^d it was held that the moral obligation resting upon the parish in which a pauper is settled, to reimburse another parish, in which the pauper happened to be taken ill, for expenses incurred in medical attendance, is not sufficient to create a legal liability without an express promise.

In *Wing v. Mill* (1817), ^e the pauper was also residing out

^a *Stewart v. Casey*, [1892] 1 Ch. 115.

^b 1 Sm. L.C. 148.

^c *Buller, Nisi Prius*, p. 147. But see 1 Selwyn's *Nisi Prius*, p. 51, n. 11.

^d 2 East, 505.

^e 1 B. & Ald. 105.

¹ "The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay." Holmes, J., in *Moore v. Elmer*, (1901) 180 Mass. 15. In *Conant v. Evans*, (1909) 202 Mass. 34, it was held that the new promise is not conclusive as to the amount to be paid.

of his parish of settlement; but that parish acknowledged its liability for his maintenance by making him a weekly allowance. The pauper fell ill and died; during his illness he was attended by Wing, an apothecary, who, after the pauper's death, was promised payment of his bill by Mill, the overseer of the parish of settlement. The court held the overseer liable.

It is not easy to ascertain the grounds of their decision from the judgments of Lord Ellenborough, C.J., and Bayley, J. Some sentences suggest that they held, on the authority of *Watson v. Turner*, that a moral obligation will support a promise; others suggest that they held that there was a legal obligation cast on the parish of residence to do that which the parish of settlement might legally have been compelled to do, and that a quasi-contractual relation thus arose between the parties;^a others again suggest that the allowance made to the pauper by the parish of settlement showed a knowledge that the pauper was being maintained at their risk, and amounted to an implied authority for bestowing the necessary medical attendance. This last is the view entertained as to the *ratio decidendi* in *Wing v. Mill* by the Court of Exchequer in the only case remaining for examination.

In *Paynter v. Williams*^b (1833) the facts were similar to those in *Wing v. Mill*, with this very important exception, that there was no subsequent promise to pay the apothecary's bill. The defendant parish, the parish of settlement, was nevertheless held liable to pay for medical attendance supplied by the parish of residence. The payment of an allowance by the parish of settlement was held by Lord Lyndhurst, C.B., to amount "to a request on the part of the officers that the pauper shall not be removed, and to a promise that they will allow what was requisite."

It would seem then that the promise in the cases cited to support this supposed rule, was either based upon a moral obligation, which, since the decision in *Eastwood v. Kenyon*,^c would be insufficient to support it, or was an acknowledgment of an existing liability arising from a contract which might be implied by the acts of the parties, — a liability which, as *Paynter v. Williams* shows, did not need a subsequent promise to create it.

And this is stated on high authority to be the true ground upon which the decision in *Watson v. Turner* may be supported.

^a See chapter on Quasi-Contract.

^b 1 C. & M. 810.

^c (1840) 11 A. & E. 438.

"The defendants, being bound by law to provide for the poor of the parish, derived a benefit from the act of the plaintiff, who afforded that assistance to the pauper which it was the duty of the defendants to have provided; this was the consideration, and the subsequent promise by the defendants to pay for such assistance *was evidence from which it might be inferred that the consideration was performed by the plaintiff with the consent of the defendants*, and consequently sufficient to support a general *indebitatus assumpsit* for work and labor performed by the plaintiff for the defendants at their request." ^a

It is strange that an exception to the general rule as to past consideration, resting on such scanty and unsatisfactory authority, should still be regarded as law. ^{b 1}

151. Exceptions. (3) Waiver of statutory privilege. A real exception, however, to the general rule is to be found in the cases in which a person has been held capable of reviving an agreement by which he has benefited, although by rules of law since repealed, incapacity to contract no longer existing, or mere lapse of time, the agreement is not enforceable against him. The principle upon which these cases rest is,

"that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law: and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." ^c

Illustrations. The following illustrations of the principle are to be found in the reports.

^a 1 Selwyn's Nisi Prius, p. 51, n. 11.

^b These *eidola* of the textbooks have been stereotyped in the Indian Contract Act, § 2, sub-s. (d), and § 25, sub-s. 2.

^c Parke, B., in *Earle v. Oliver*, (1848) 2 Ex. 90.

¹ But authority is neither scanty nor unsatisfactory to the effect that where the plaintiff has done what it was the defendant's legal duty to do, and the facts were such that the plaintiff's action may be regarded as a public service, the defendant owes a non-contract debt to the plaintiff for the value of the service rendered. In such cases a promise by the defendant is not necessary; but if made, it may be regarded as co-extensive with an already existing legal duty and may be regarded as a new operative fact creating a *consensual* duty, turning the quasi-contract into contract. Doubtless, the new promise was unnecessary to recovery; and yet such express recognition by the defendant will certainly strengthen the conviction of the court that a duty already existed. Just as in the case of past service rendered at request, the new promise may be held to be nothing more than *evidence* of the value of the service. If so, the promise is not in itself an operative fact, and would in no case create a duty to pay more than reasonable value. See Keener, *Quasi-Contracts*, chap. 7; Woodward, *Quasi-Contracts*, chap. 14.

(1) A promise by a person of full age to satisfy debts contracted during infancy was binding upon him^a before the Infants' Relief Act, 1874, made it impossible to ratify, on the attainment of majority, a promise made during infancy.^{b 1}

(2) A debt barred by the Statute of Limitations is consideration for a subsequent promise to pay it.^{c 2}

^a *Williams v. Moor*, (1843) 11 M. & W. 256.
^b 37 & 38 Vict. c. 62.

^c 31 Jan. 1, s. 16.

¹ An adult may ratify such contracts. *Read v. Batchelder*, (1840, Mass.) 1 Metc. 559; *Hatch v. Hatch*, (1887) 60 Vt. 160; *Henry v. Root*, (1865) 33 N.Y. 526, 545. Some states require the new promise to be in writing. *Ante*, § 94. See *post*, § 158.

² There is no dispute that after a claim has been barred by the Statute of Limitations, it may be revived by a new promise without a new consideration. Much effort has been expended, however, in determining the theory upon which the remedy is given. Probably the prevailing theory is that the new promise is in itself the cause of action, being based upon a past consideration. See *Dusenbury v. Hoyt*, (1873) 53 N.Y. 521. In other cases it has been said that the *cause of action* is the original transaction, and that the new promise is merely the waiver of a defense. *Ilaley v. Jewett*, (1841, Mass.) 3 Metc. 439; *Way v. Sperry*, (1850, Mass.) 6 Cush. 238. Whichever view is taken, it should be held that the new promise determines the extent and conditions of the plaintiff's recovery. Even regarding it as a waiver of a defense, the waiver may be only partial or conditional. *Gillingham v. Brown*, (1901) 178 Mass. 417. The reasonable theory seems to be that the operative facts upon which the plaintiff's present right is based consist of both the past transaction and the new promise. Prior to the new promise, there was no enforceable right; and the new promise standing alone would not create one. It is of no service, therefore, to say that the new promise is a mere waiver of a defense, and that it is the old right that is being enforced. The new promise is as necessary as is the old transaction. This is clearly a case where the law looks into the past and finds there a sufficient reason for enforcing a new promise. The same is true of all the other cases in § 151, *supra*.

New promise after a discharge in bankruptcy. It was formerly held in England that a promise by a bankrupt, made either before or after his discharge, to pay the unpaid balance notwithstanding the discharge, was enforceable at law, the past debt being a sufficient consideration. See *Trueman v. Fenton*, (1777) Cowp. 544; *Kirkpatrick v. Tattersall*, (1845) 13 M. & W. 766. The English Bankruptcy Acts of 1849 and 1861 provided that such promises should not be binding. The later Bankruptcy Acts of 1869, 1883, and 1914 contain no such provision, and yet the courts have held that the new promise is not enforceable in the absence of a new consideration. *Heather v. Webb*, (1876) 2 C.P.D. 1; *Jakeman v. Cook*, (1878) 4 Ex. D. 26; *Re Bonacina*, [1912] 2 Ch. 394. See 1 *Smith's Lead. Cas.* 168 (12th ed.).

The prevailing rule in the United States is that the new promise is enforceable, the past consideration being sufficient. *Dusenbury v. Hoyt*, (1873) 53 N.Y. 521; *Lawrence v. Harrington*, (1890) 122 N.Y. 408; *Edwards v. Nelson*, (1883) 51 Mich. 121; *Herrington v. Davitt*, (N.Y., 1917) 115 N.E. 476; *Zavelo v. Reeves*, (1913) 227 U.S. 625; 5 Cyc. 407-10.

New promise after a voluntary discharge. The general rule is that a new promise made after a voluntary release by the creditor or after an accord

(3) In *Lee v. Muggeridge*^a a married woman (who, as the law then stood, was incapable of contracting) gave a bond for money advanced at her request to her son by a former husband. Afterwards, when a widow, she promised that her executors should pay the principal and interest secured by the bond, and it was held that this promise was binding.¹

(4) In *Flight v. Reed*^b bills of exchange were given by the defendant to the plaintiff to secure the repayment of money lent at usurious interest while the usury laws were in force. The bills were by those laws rendered void as between the plaintiff and defendant. After the repeal of the usury laws by 17 & 18 Vict. c. 90 the defendant renewed the bills, the consideration for renewal being the past loan, and it was held that he was liable upon them.²

Common elements in all the cases. There are certain features common to all these cases. The parties are clearly agreed: the contract has been fulfilled for the benefit of one of the parties, while the other cannot get what he was promised, either because he has dealt with one who was incapable of contracting, or because a technical rule of law makes the agreement unenforceable. If the party who has received the benefit which he expected from the agreement afterwards acquires capacity to

^a (1813) 5 Taunt. 36.

^b (1863) 1 H. & C. 703.

and satisfaction, such as a voluntary composition with creditors, is not enforceable. They operate much like payment in full and leave no moral obligation. See *Shepard v. Rhodes*, (1863) 7 R.I. 470; *Grant v. Porter*, (1884) 63 N.H. 229; cf. *Straus v. Cunningham*, (1913) 144 N.Y. Supp. (App. Div.) 1014.

¹ *Accord*: *Sharpless' Appeal*, (1891) 140 Pa. 63; *Goulding v. Davidson*, (1863) 26 N.Y. 604, 611, where Balcom, J., says, "I will add that the fact is controlling with me, that the defendant personally received a valuable consideration for the money she has promised to pay, and this distinguishes the case from some that seem to weigh against the conclusion that the defendant's promise is valid." *Contra*: *Holloway v. Rudy*, (1901) 22 Ky. L.R. 1406; 60 S.W. 650; *Waters v. Bean*, (1854) 15 Ga. 358; *Kent v. Rand*, (1886) 64 N.H. 45; *Putnam v. Tennyson*, (1875) 50 Ind. 456; *Musick v. Dodson*, (1882) 76 Mo. 624; *Condon v. Barr*, (1886) 49 N.J. L. 53; *Hayward v. Barker*, (1890) 52 Vt. 429. *Lee v. Muggeridge* is generally disapproved in the United States, except where a moral consideration will support a promise. See 53 L.R.A. 366-370 n, 7 L.R.A. (N.S.) 1053, 33 L.R.A. (N.S.) 741.

² *Hammond v. Hopping*, (1835, N.Y.) 13 Wend. 505; *Sheldon v. Hartun*, (1883) 91 N.Y. 124. A new promise to pay the sum justly due, excluding the usurious interest, has frequently been enforced. See 39 Cyc. 997; 29 A. & E. Enc. Law, 531. Where a contract was made void by a Sunday law, a new promise to pay, made on a week-day, was enforced in *Brewster v. Banta*, (1901) 66 N.J. L. 367, 49 Atl. 718.

contract; or if the rule of law is repealed, as in the case of the Usury Acts; or, as in the case of the Statute of Limitations, admits of a waiver by the person whom it protects, then a new promise based upon the consideration already received is binding.

They do not rest upon moral obligation. The cases thus regarded seem a plain and reasonable exception to the general rule that a past consideration will not support a promise. Unfortunately, they were at one time based upon the *moral obligation* which was supposed to bind the person benefited and to give efficacy to his promise.¹

It would have seemed enough to say that when two persons have made an agreement, from which one has got all the benefit he expected, but is protected by technical rules of law from liability to do what he had promised in return, he will be bound if, when those rules have ceased to operate, he renews his original promise. But when once the law of contract was brought into the cloudland of moral obligation, it became extremely hard to say what promises might or might not be enforced; and the language used in some of the cases cited above was calculated to make the validity of contracts turn upon a series of ethical problems. In *Lee v. Muggeridge*,^a Mansfield, C.J., says, "It has long been established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is whether upon this declaration there appears a good moral obligation."

In no case did "moral obligation" play a more prominent part than in *Lee v. Muggeridge*; but the doctrine, after it had undergone some criticism from Lord Tenterden,^b was finally limited by the decision in *Eastwood v. Kenyon*. Eastwood had been guardian and agent of Mrs. Kenyon, and, while she was a minor, had incurred expenses in the improvement of her property: he did this voluntarily, and in order to do so was compelled to borrow money, for which he gave a promissory note.

^a (1813) 5 Taunt. 46.

^b *Littlefield v. Shree*, (1831) 2 B. & Ad. 811.

¹ The practice is almost universal, in the cases dealt with in this section, to say that the consideration is the moral obligation. No doubt this term is of too uncertain a connotation to make its use desirable here. Perhaps it is a better form of expression to say that in these classes of cases it is so generally and so certainly believed that the debtor ought to pay, if he can, that the law empowers him to bind himself to do so by making a mere voluntary promise. It is not that all moral obligations are sufficient; but these selected classes of moral obligations are sufficient.

When the minor came of age she assented to the transaction, and after her marriage her husband promised to pay the note. Upon this promise he was sued. The moral duty to fulfill such a promise was insisted on by the plaintiff's counsel, but was held by the court to be insufficient where the consideration was wholly past. "Indeed," said Lord Denman in delivering judgment, "the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."^{a 1}

Thus was finally overthrown the doctrine formulated by Lord Mansfield that consideration was only one of various modes by which it could be proved that parties intended to contract: a doctrine which, in spite of the decision in *Rann v. Hughes*,^b survived in the theory that the existence of a moral obligation was evidence that a promise was intended to be binding. Consideration is not one of several tests, it is the only test of the intention of the promisor to bind himself by contract.²

^a (1840) 11 A. & E. 450.

^b (1778) 7 T.R. 350, note.

¹ The general doctrine of promises which operate as waivers of a technical bar interposed by law, is well stated and discussed in *Smith v. Tripp*, (1883) 14 R.I. 112.

Another instance of such waivers is the case of a promise by an indorser or drawer of a negotiable instrument, who has been discharged for want of due notice of dishonor. *Sigerson v. Mathews*, (1857, U.S.) 20 How. 496; *Ross v. Hurd*, (1877) 71 N.Y. 14; *Rindge v. Kimball*, (1878) 124 Mass. 209; *Hobbs v. Straine*, (1889) 149 Mass. 212. *Negotiable Inst. Law*, §§ 109-111 (N.Y. 180-182). See 29 L.R.A. 305; 3 L.R.A. (N.S.) 1079. Also, for waiver before maturity, L.R.A. 1916 B, 944.

Another exception to the rule that a past consideration will not support a promise exists in the case where a debtor gives additional security to his creditor, or a principal to his surety, on a pre-existing debt, without any new consideration. "No case can be found in which a man's own debt has been ruled to be an insufficient consideration between him and his creditor, for a mortgage or other security received by the latter from his debtor." *Turner v. McFee*, (1878) 61 Ala. 468, 472; *Paine v. Benton*, (1873) 32 Wis. 491; *Duncan v. Miller*, (1884) 64 Iowa, 223; *Williams v. Silliman*, (1889) 74 Tex. 626. So the transfer of a negotiable instrument as security for a pre-existing debt is on a sufficient consideration as between the parties; whether it is as to third parties the American cases are not agreed. *Coddington v. Bay*, (1822, N.Y.) 20 Johns. 637; *Railroad Co. v. National Bank*, (1880) 102 U.S. 14. See *Negotiable Instruments Law*, § 25 (N.Y. § 51).

² This seems to be altogether too narrow and dogmatic. Consideration is not merely an *evidential* fact, with the intention of the promisor as the sole *operative* fact. Without consideration, the promisor can safely confess in open court that it was his intention to be legally bound. And in some instances he will be held to have contracted, even though it is now clear that he did not intend to be bound. (See *ante*, § 6, and notes). Consideration is itself an *operative* fact, which, added to a promissory expression, creates legal duty. (See *ante*, § 118, note.)

152. Foreign contracts and the doctrine of consideration. We have been discussing throughout this chapter the rules of English law relating to consideration. It must not, however, be forgotten that English courts may from time to time have to entertain actions relating to contracts which are not governed by English law. The rules which determine the law which governs a contract, or, as it is called, the "proper law" of the contract, are a branch of private international law and cannot be discussed at length in this place. It is sufficient to say that the intention of the parties is the determining factor, and, where that intention has either not been expressed or cannot be collected from the terms and circumstances of the contract, the *lex loci contractus*, the law of the place where the contract is made, is presumed to be the law by which the parties intended their contract to be governed. The reader will do well to refer to the case of the *British South Africa Company v. De Beers Mines*^a in which he will find all the authorities upon the subject reviewed. If therefore it should be ascertained that the proper law of the contract before the court is not the law of England, the question whether the contract is a valid one will not be determined by English law, and reference must be made to the proper law of the contract to determine whether consideration is required for its validity. This is what happened in the case of *In re Bonacina*,^b where the effect of a "privata scrittura" in Italian law was considered. It was proved that a promise in this form based upon the moral obligation to pay a just debt created according to Italian law a new and valid legal obligation which would be enforced in the Italian courts. The proper law of contract being Italian law, the Court of Appeal held that the English doctrine of consideration did not apply, and that the contract, being valid by its proper law, was enforceable in England, although, if it had been an English contract, it would have been invalid for want of consideration.

^a [1910] 1 Ch. 354; 2 Ch. 502.

^b [1912] 2 Ch. 394.

CHAPTER V

Capacity of Parties

153. Contractual disabilities.¹ In the topics which we have hitherto discussed we have dealt with the primary elements of contract. The parties must be brought together by offer and acceptance, and they must make an agreement which the courts will regard as a legal transaction either by reason of its form, or because of the presence of consideration.

But such a transaction may take place between parties, one or both of whom are under some disability for making a valid contract: it is therefore necessary to deal with these disabilities: in other words, with the capacity of parties.

Certain persons are by law incapable, wholly or in part, of binding themselves by a promise, or of enforcing a promise made to them. And this incapacity may arise from the following causes:

- (1) Political or professional status.
- (2) Youth, which, until the age of 21 years, is supposed to imply an immaturity of judgment needing the protection of the law.
- (3) Artificiality of construction, such as that of corporations, which, being given a personality by law, take it upon such terms as the law imposes.
- (4) The permanent or temporary mental aberration of lunacy or drunkenness.
- (5) Marriage. Until the 1st of January, 1883, marriage effected a merger of the contractual capacity of the wife in that of her husband, subject to certain exceptions. The Married Women's Property Acts of 1882 and 1893 have greatly changed the law in this respect.

1. *Political or Professional Status*

154. Aliens. An alien has ordinarily the contractual capacity of a natural-born British subject, except that he cannot acquire property in a British ship.²

¹ *Disability* is the opposite of *power* and the correlative of *immunity*. The "capacity" of a party means the sum-total of his legal powers to create new legal relations by his voluntary acts.

² An alien cannot acquire property in an American ship or be an officer

Alien enemies. In time of war, however, an alien who is an enemy, so far as concerns his capacity to contract or to enforce contracts already made, is subject to severe restrictions. For the purposes of the war of 1914-1918 these restrictions were still further increased by Trading with the Enemy Acts which make commercial dealings of all kinds, direct and indirect, with the King's enemies a criminal offense; but it will be sufficient here to indicate the common-law rules upon the subject.

We must note in the first place that nationality is not the test of enemy status for this purpose. The full Court of Appeal in *Porter v. Freudenberg*,^a after reviewing all the authorities, has laid it down that the place where the person in question voluntarily resides or carries on business is the determining factor; so that an enemy subject who resides or carries on business exclusively in a neutral country or (with the license of the Crown) in Great Britain itself, may contract or sue on the same footing as an alien friend.

The position of an alien enemy as above defined appears to be as follows.¹ (1) He cannot enter into any contract with a British subject during the continuance of the war. (2) He cannot until the war is over sue in the King's Courts on any

^a [1915] 1 K.B. 857.

of one. U.S. Rev. St. § 4131. In many states an alien cannot acquire and hold title to real property. See 2 Kent, Comm. 54-64. But state laws as to rights of aliens yield to treaties made by the United States. *Hauenstein v. Lynham*, (1879) 100 U.S. 483.

¹ Any fresh contract across the lines of hostilities is illegal. *United States v. Grossmayer*, (1869, U.S.) 9 Wall. 72; *Griswold v. Waddington*, (1819, N.Y.) 16 Johns. 438. But if an alien enemy is permitted to remain in the hostile country contracts made there are valid. *Kershaw v. Kelsey*, (1868) 100 Mass. 561; *Conrad v. Waples*, (1877) 96 U.S. 279; *U.S. v. Quigley*, (1880) 103 U.S. 595. An alien enemy resident in his own country cannot sue in our courts, but he may be sued if he or his property can be reached by process. *Masterson v. Howard*, (1873, U.S.) 18 Wall. 99; *Dorsey v. Kyle*, (1869) 30 Md. 512, 96 Am. Dec. 617, note 630-33. The statute of limitations is suspended during hostilities. *Brown v. Hiatts*, (1872, U.S.) 15 Wall. 177.

An alien enemy who is permitted to reside here and do business can also maintain suit. *Clarke v. Morey*, (1813, N.Y.) 10 Johns. 69; *Posselt v. D'Espard*, (1917, N.J. Ch.) 100 Atl. 893. The "Trading with the Enemy" Act of Oct. 6, 1917, appears to apply only in case of persons resident in or carrying on business within the territory of the enemy country. See 27 *Yale Law Journal*, 104.

As to whether a domestic corporation, most of whose shareholders are alien enemies, is itself incapable of suing or of doing business, see *Daimler v. Continental Tyre Co.*, [1915] 1 K.B. 893; *Frits Schults Co. v. Raimés*, (1917) 166 N.Y. Supp. 567; *Mines de Barbary v. Raymond*, (1916, Court of Paris) 44 *Clunet*, 229; 27 *Yale Law Journal*, 108, 557.

cause of action which has accrued before the war.^a (3) He may be sued on a cause of action which has accrued before the war and may appear and defend the action, and, if unsuccessful, may appeal to a higher tribunal.^b (4) Contracts made before the war with an alien enemy the performance of which would involve continual commercial intercourse of a kind which the outbreak of war has made illegal, such as a partnership, are wholly dissolved, as are also (it would seem) contracts which, if performed, would be of substantial assistance to the commerce of the enemy's state or detrimental to the interests of this country.^c (5) In the case of contracts not falling within the above description, performance is prohibited for the duration of the war, and therefore no cause of action can be maintained subsequently in respect of non-performance during the war. Often this will be practically equivalent to a dissolution, as for example in the case of a contract to deliver goods within a specified time. If the war lasts beyond the time fixed for delivery, neither party has any rights against the other after the conclusion of peace. In other cases the rights and liabilities under the contract will apparently revive when the war is over. Thus it can scarcely be supposed that a British Company could refuse to pay the executors of one of their policy-holders on the ground that during the currency of the policy the policy-holder has for a period been an alien enemy. The law on the point is, however, not altogether clear, and where the war has so far affected performance that in normal circumstances the other party to the contract would have been justified in refusing to be bound any longer by it, it is probable that the contract is at an end, even though by its terms it was to continue beyond the period of the war. This, however, relates rather to the discharge than to the formation of contract.

The Crown may at its discretion grant a license to an alien enemy to contract and sue in time of war, and in that case his position will be exactly the same as that of an alien friend.

Foreign sovereigns. The position of foreign states and sovereigns may also be conveniently referred to in this connection. They have full *capacity* to enter into contracts in England, but neither they nor their representatives nor the officials and household of their representatives are in any way subject to the

^a *Brandon v. Nesbitt*, (1794) 6 T.R. 23. ^b *Porter v. Freudenberg*, [1915] 1 K.B. 857.
^c *Zinc Corporation v. Hirsch*, [1916] 1 K.B. 541.

¹ *Griswold v. Waddington*, (1819, N.Y.) 16 Johns. 438.

jurisdiction of the English Courts,^a and it is even doubtful whether they can voluntarily subject themselves to it.^b Their contracts cannot therefore be enforced against them, although they are capable of enforcing them. This immunity extends to a British subject accredited to Great Britain by a foreign state.^{c 1}

A modern case illustrates the rule. A foreign sovereign residing in this country as a private person, made a promise of marriage under an assumed name. He did not thereby subject himself to the jurisdiction of our courts, and so could not be sued for breach of his promise.^d

155. Felon undergoing sentence. A person convicted of treason or felony cannot, during the continuance of his sentence, make a valid contract; nor can he enforce contracts made previous to conviction: but these may be enforced by an administrator appointed for the purpose by the Crown.^{e 2}

156. Barristers and physicians in England. A barrister cannot sue for fees due to him for services rendered in the ordinary course of his professional duties, whether the action be framed as arising upon an implied contract to pay for services

^a 7 Anne, c. 12; *Taylor v. Best* (1854) 14 C.B. 487.*

^b *In re Bolivia Exploration Syndicate*, [1914] 1 Ch. 139.

^c *Macartney v. Garbutt*, (1890) 24 Q.B.D. 368.

^d *Milghell v. The Sultan of Johore*, [1894] 1 Q.B. (C.A.) 149.

^e 33 & 34 Vict. c. 23, §§ 8, 9, 10.

* In accord is *Re Suares*, (1917, Ch. D.) 117 L.T. 239; 27 *Yale Law Journal*, 392. A similar statute in the United States is U.S. Rev. St. §§ 4063-64.

The immunity of a sovereign is not lost by virtue of his becoming a partner in a commercial enterprise. *The Parlement Belge*, (1880, C.A.) 5 P.D. 197, 216; *Mason v. Intercolonial Ry.*, (1908) 197 Mass. 349. Nor does a sovereign, by voluntarily bringing suit against one party, waive his immunity from an interpleader by a third party. *Kingdom of Roumania v. Guaranty Trust Co.*, (1918, C.C.A.) 250 Fed. 841, reversing 244 Fed. 195. By statute, a defendant sued by the United States may set off amounts due him in reduction of the plaintiff's claim. *United States v. Wilkins*, (1821, U.S.) 6 Wheat. 135. But no affirmative judgment will be rendered against the sovereign. *United States v. Eckford*, (1867, U.S.) 6 Wall. 484; *People v. Dennison*, (1881) 84 N.Y. 272. See 27 *Yale Law Journal*, 278.

¹ See 1 Kent, Comm. 38-39; *Holbrook v. Henderson*, (1851, N.Y.) 4 Sandf. 619; *In re Bais*, (1890) 135 U.S. 403. The exemption does not extend to consuls. *Börs v. Preston*, (1883) 111 U.S. 252; *Wilcox v. Luco*, (1897) 118 Cal. 639.

² In the absence of prohibitory statutes a convict may make contracts (*Stephani v. Lent*, (1900) 30 N.Y. Misc. 346, 63 N.Y. Supp. 471), or sue or be sued upon contracts. *Wilson v. King*, (1894) 59 Ark. 32; *Dade Coal Company v. Haalett*, (1889) 83 Ga. 549; *Kenyon v. Saunders*, (1894) 18 R.I. 590; *Byers v. Sun Sav. Bank*, (1914, Okl.) 139 Pac. 948. See *Avery v. Everett*, (1888) 110 N.Y. 317; 18 L.R.A. 82, note; 9 Cye. 870-75.

rendered on request, or upon an express contract to pay a certain sum for the conduct of a particular business.^a

A physician, until the year 1858, was so far in the position of a barrister that the rendering of services on request raised no implied promise to pay for them, though the patient might bind himself by express contract. The Medical Act (1858, 21 & 22 Vict. c. 90, § 31) enabled every physician to sue on such an implied contract, subject to the right of any college of physicians to make by-laws to forbid the exercise of this privilege by their Fellows. And this is re-enacted in substance by the Medical Act 1886.^{b 1}

2. *Infants*

157. Infants' contracts voidable. The rights and liabilities of infants under contracts entered into by them during infancy² rest upon common law rules which have been materially affected by statute. I will first state the common law upon the subject.³

At common law there were but two classes of contracts which though made by an infant were as valid as though made by a person of full age; namely, contracts for necessities and (in certain cases) contracts for the infant's benefit.

In all other cases common law treated an infant's contracts as being voidable at his option, either before or after the attainment of his majority; and Sir F. Pollock in an exhaustive argument has shown that this was so, even where the contract was not for the infant's benefit.^c But these voidable contracts must be divided under two heads:

^a *Kennedy v. Brown*, (1863) 13 C.B. (N.S.) 677.
^c *Pollock on Contracts* (8th ed.), 56-61.

^b 49 & 50 Vict. c. 48, § 6.

¹ In the United States lawyers and physicians who are duly licensed are under no such disability. *Shelton v. Johnson*, (1874) 40 Iowa, 84; *Vilas v. Downer*, (1849) 21 Vt. 419; *Garrey v. Stadler*, (1886) 67 Wis. 512.

It has been held in New York that because of the fiduciary nature of the relation, a client may properly discharge his attorney at any time, in spite of an agreement to the contrary, the attorney being entitled only to *quantum meruit* and not to damages. *Martin v. Camp*, (1916) 219 N.Y. 170; *In re City of New York*, (1916) 219 N.Y. 192. *Contra*: *Bartlett v. Odd Fellows Savings Bank*, (1889) 79 Cal. 218; *Moyer v. Cantieny*, (1889) 41 Minn. 242; *Scheinesohn v. Lemonek*, (1911) 84 Ohio St. 424.

² The age of majority for women is fixed at eighteen in some states. *Stimson*, Am. St. Law, § 6601. Majority is reached on the first minute of the day preceding the twenty-first birthday. *Bardwell v. Purrington*, (1871) 107 Mass. 419; *Hamlin v. Stevenson*, (1836, Ky.) 4 Dana, 597. Some states provide that emancipation may hasten the age of majority. *Stimson*, Am. St. Law, § 6606.

³ See American note, *post*, §§ 161-161b.

(a) Contracts which were valid and binding on the infant *until he disaffirmed them*, either during infancy or within a reasonable time after majority;

(b) Contracts which were not binding on the infant *until he ratified them* within a reasonable time after majority.¹

158. Ratification by mere enjoyment of benefits. Where an infant acquired an interest in permanent property to which obligations attach, or entered into a contract involving continuous rights and duties, benefits and liabilities, and took some benefit under the contract, he would be bound, unless he expressly disclaimed the contract.¹

Illustrations may be found in the following cases. They do not appear to be affected by subsequent legislation.

An infant lessee who occupies until majority is liable for arrears of rent which accrued during his minority.^{a 2}

Shareholders who became possessed of their shares during infancy are liable for calls which accrued while they were infants.³

The grounds of infants' liability under these conditions have been thus stated:

"They have been treated therefore as persons in a different situation from mere contractors, for then they would have been exempt: but in

a Rolle, Abr. 731.

¹ The text here creates difficulty because of the failure to analyse "contract" and to sever the *acts* of the parties and other *factual* elements from the *legal relations* that are consequent thereon. Suppose the infant's *act* is a mere executory promise; this act is "valid" (legally operative) to create in the infant a *legal power* as explained *infra*, §§ 161-161b. It creates no duty whatever, for the infant is legally privileged not to perform what he promised. The adult's executory promise creates a legal duty in him, but there is also the liability that this duty will be destroyed by the exercise of the infant's power.

In cases where one act of the infant is the act of conveying property, the act is "valid" to create certain property relations. The grantee gets a *right* of possession against all but the infant (who still retains the right and privilege of entry to disaffirm); he gets the *power* of conveying the property to third persons; he has the *privilege* of use and enjoyment. He has not the usual *immunity*, however; for the infant has the *power* of disaffirmance, the power to destroy the foregoing rights, powers, and privileges of the grantee.

It will be observed, therefore, that in both classes of cases the infant's *act* will be "valid" (legally operative) for certain purposes and not for others; it will create certain legal relations and not others. See American note, *post*, §§ 161-161b.

² See McClure v. McClure, (1881) 74 Ind. 108. But not in an action brought during the infancy of the lessee. Flexner v. Dickerson, (1882) 72 Ala. 318. See 18 Am. St. Rep. 589-92.

³ A purchase of shares may be avoided and the purchase money recovered. Indianapolis Chair Mfg. Co. v. Wilcox, (1877) 59 Ind. 429; Hamilton v. Vaughan, etc., Eng. Co., (1894) L.R. 3 Ch. 589.

truth, they are purchasers who have acquired an interest, *not in a mere chattel, but in a subject of a permanent nature*, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate; for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission in the case of a copyhold to which an infant has been admitted, unless they have *elected to waive or disagree the purchase altogether*, either during infancy or after full age, at either of which times it is competent for an infant to do so."^{a 1}

Similarly an infant may become a partner, and at common law may be entitled to benefits, though not liable for debts, arising from the partnership during his infancy. Equity however would not allow an infant, in taking the partnership accounts, to claim to be credited with profits and not debited with losses. But what is important for our present purpose to note is, that unless on the attainment of majority there be an express rescission and disclaimer of the partnership, the partner will be liable for losses accruing after he came of age.^{b 2}

Where an infant held himself out as in partnership with X, and continued to act as a partner till shortly before he came of age, and then, though ceasing to act as a partner, did nothing to disaffirm the partnership, he was held liable on debts which accrued, after he came of age, to persons who supplied X with goods.

^a Evelyn v. Chichester, (1765) 3 Burr. 1717; N.W. R. Co. v. McMichael, (1850) 5 Ex. 114.

^b Lindley, Partnership (7th ed.), 88, 89.

¹ See 18 Am. St. Rep. 615-18.

² It has been held that acting as a partner after majority renders an infant liable for debts of the firm contracted during his minority. *Miller v. Sims*, (1834, S.C.) 2 Hill, 479, and see *Penn v. Whitehead*, (1867, Va.) 17 Gratt. 503. Compare *Crabtree v. May*, (1841, Ky.) 1 B. Mon. 289. An infant may disaffirm his partnership contract, but the assets of the firm will be devoted to the payment of creditors before he can withdraw his contribution. *Shirk v. Shultz*, (1887) 113 Ind. 571; *Yates v. Lyon*, (1874) 61 N.Y. 344; *Moley v. Brine*, (1876) 120 Mass. 324. The assets of the firm represent the consideration received by the firm for that which has been paid out and for the promises they have made. The infant no doubt has the power to disaffirm each individual contract that he, as a member of the firm, has made with third parties; but it is not equitable to allow him to keep these assets and at the same time to disaffirm. The complexity resulting from the large number of persons involved no doubt makes it more difficult to work out a complete disaffirmance. Subject to the rights of creditors and to losses suffered, he may recover the fund he has contributed. *Sparman v. Keim*, (1880) 83 N.Y. 245. See 18 Am. St. Rep. 601-05.

"Here," said Best, J., "the infant, by holding himself out as a partner, contracted a *continual obligation*, and that obligation remains till he thinks proper to put an end to it. . . . If he wished to be understood as no longer continuing a partner, *he ought to have notified it to the world.*"^a

And so where shares were assigned to an infant who attained his majority some months before an order was made for winding up the company, it was held that in the absence of any disclaimer of the shares the holder was liable as a contributory.^b

Although the liabilities incurred by the infant are somewhat different in these different cases, yet there is this feature common to all of them, that nothing short of express disclaimer will entitle a man, on attaining his majority, to be free of obligations such as we have described.

158a. When an express ratification is necessary. In the case of contracts that are not thus continuous in their operation, the infant was not bound unless he expressly ratified them upon coming of age. Thus a promise to perform an isolated act, such as to pay a reward for services rendered, or a contract wholly executory, and indeed all other contracts other than continuing contracts or contracts for necessities or for the infant's benefit required an express ratification.¹

Such was the common law upon the subject: let us consider how it has been affected by legislation.

159. English statutory changes. The Infants' Relief Act of 1874 appears to have been designed to guard not merely against the results of youthful inexperience, but against the consequences of honorable scruples as to the disclaimer of contracts upon the attainment of majority. Its provisions are as follows:

1. "All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity enter, except such as now by law are voidable.

2. "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or

^a *Goode v. Harrison*, (1821) 5 B. & Ald. 159.

^b *Larned v. Case*, (1868) 4 Ch. 31.

¹ See *infra*, §§ 161-161a.

contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." ^a

The precise meaning of the provisions of this Act is not easy to ascertain, but its effect may be summarized as follows:

1. Three classes of infants' contracts are, for the first time, made absolutely void; namely, for money lent or to be lent; for goods supplied or to be supplied (other than necessities); and accounts stated.

2. (a) Contracts for necessities supplied or to be supplied are valid and binding on an infant (as they have always been), and so also are (b) contracts into which an infant could validly enter at the date of the Act and which at the same time were not voidable by him; that is, certain contracts for the infant's benefit.

3. It is no longer possible for an infant to ratify after majority that class of contracts which before the Act were invalid until affirmed; and this is so, whether there is a new consideration for the promise or ratification after majority or not.

4. Contracts which before the Act were valid until disaffirmed are not affected by the Act.

We may now consider these four points in greater detail.

Judicial construction of section 1. Section 1 of the Act has been strictly construed.

An infant who had contracted trading debts was convicted on an indictment charging him with having defrauded his creditors within the meaning of the Debtors' Act, 1869.^b The conviction was quashed on the ground that the transactions which resulted in debts were void under the Infants' Relief Act. There were consequently no creditors to defraud.^c On the same reasoning an infant cannot be made a bankrupt in respect of such debts.^d

And the Court of Appeal has held that a false representation by an infant that he was of full age, whereby the plaintiff was induced to lend him money, cannot impose any contractual liability upon him by way of estoppel or otherwise; for the Act makes such a contract absolutely void.^e

But, it may be asked, can an infant who has received goods and paid their price recover his money, or the tradesman his goods, on the ground that the transaction is void?

This much is clear, that if an infant has paid money and taken benefit under the contract he cannot recover the money so paid.

An infant hired a house and agreed to pay the landlord £100

^a 37 & 38 Vict. c. 62. ^b 32 & 33 Vict. c. 62. ^c *R. v. Wilson*, (1880) 5 Q.B.D. 28.
^d *Ex parte Jones*, (1881) 18 Ch. D. 109. ^e *Levene v. Brougham*, (1909) 25 T.L.R. 265.

for the furniture. He paid £80 and gave a promissory note for the balance. After some months' use of the house and furniture he came of age, and then took proceedings to get the contract and the promissory note set aside, and to recover the money which he had paid. He obtained relief from future liabilities on the contract and note, but could not recover money paid for furniture of which he had enjoyed the benefit.^a

In the converse case, there is no authority precisely in point, although *Hamilton v. Vaughan-Sherrin Co.*^b shows that an infant who has bought shares on which no dividend has been paid, may within a reasonable time repudiate the shares and recover the money. In this case six weeks had elapsed, and the infant had not attended any meeting or otherwise affirmed his position as a shareholder. Although the purchase of shares in a company is not a transaction which would fall under § 1 of the Infants' Relief Act, the language of the court is so full and explicit as to suggest a general rule, that where benefit has been received the infant cannot recover money paid; that where no benefit has been received he can.

160. Contracts for necessities. An infant can bind himself by contract for necessities whether these take the form of a supply of goods or a loan of money; but it must be assumed that the loan is made in immediate contemplation of the purchase of necessities and is expended upon them.

But the precise ground of the infant's liability in either case is not clear and may not be co-extensive with the exception made by § 1 of the Act.¹

The liability in respect of a loan seems in equity to rest on a rule which is of wider application than the rule as to necessities. A loan of money to pay for necessities was not recoverable at common law; but in chancery it was held that if an infant borrowed money to pay a debt for which by law he was liable, and the debt was paid therewith, the lender "stood in the place of the person paid" and was entitled to recover the money lent.^c

The liability for necessities in the form of goods has been placed on another ground than that of exemption from statutory incapacity to contract, by Act of Parliament and by judicial decision. The Sale of Goods Act, 1893, enacts in § 2:

^a *Valentini v. Canali*, (1889) 24 Q.B.D. 166.

^b [1894] 3 Ch. 589.

^c *Marlow v. Pitfield*, (1719) 1 P. Wms. 558; *National Benefit Society v. Williamson*, (1869) 5 Ch. 313.

¹ The English statute seems not to have changed the common law very materially in the matter of necessities.

"Where necessities are sold and delivered to an infant or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

"Necessaries in this section means goods suitable to the condition in life of such an infant or minor or other person and to his actual requirements at the time of sale and delivery."

Here the legal liability to pay and the incapacity to contract are put side by side as co-existent and the infant would seem to be liable for necessities, not because he was in this respect able to contract, but because he was bound *quasi ex contractu*.¹ This view is expressed by Fletcher Moulton, L.J., in *Nash v. Inman*:^a

"An infant like a lunatic is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic, the law will imply an obligation to repay him for the services so rendered and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensu*."

The liability is undoubted, whatever may be the true grounds on which it is based.

The Sale of Goods Act says nothing of goods *to be supplied*. It is quite possible that an infant might order goods which were un-

^a [1908] 2 K.B. 1, 8.

¹ The modern American cases tend to hold that an infant's liability for necessities rests upon the doctrines of quasi-contract. He is liable not because he agreed to be, but because it is good public policy that he should be; and he is compelled to pay, not what he promised to pay, but what he ought reasonably to pay. "The obligation of an infant to pay for necessities actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi-contractual nature; for it may be imposed on an infant too young to understand the nature of a contract." *Mauldin v. Southern S. & B. Univ.*, (1908) 3 Ga. App. 800; *Gregory v. Lee*, (1894) 64 Conn. 407, 413; *Trainer v. Trumbull*, (1886) 141 Mass. 527; 18 Am. St. Rep. 643-47. He is not liable on an executory contract for necessities. *Gregory v. Lee*, *supra*; *Jones v. Valentines' School*, (1904) 122 Wis. 318; *Wallin v. Highland Park Co.*, (1905) 127 Iowa, 131. *Contra*, *Roberts v. Gray*, [1913] 1 K.B. 520.

Whether an action lies on a note or bond given for necessities there is a conflict of authority. No action lies: *Ayers v. Burns*, (1882) 87 Ind. 245; *Swasey v. Vanderheyden*, (1813, N.Y.) 10 Johns. 33. *Contra*: *Earle v. Reed*, (1845, Mass.) 10 Met. 387; *Bradley v. Pratt*, (1851) 23 Vt. 378; *Aakey v. Williams*, (1889) 74 Tex. 294.

Where the infant's contract for necessities was fair and reasonable at the time it was made, and has been fully performed on both sides, the infant has been denied the right to disaffirm and to sue for *quantum meruit*, even though his service rendered turned out to be worth more than the necessities received. *Stone v. Dennison*, (1832, Mass.) 13 Pick. 1.

doubtedly necessities when ordered, but that his needs might be met from some unseen source before the goods were supplied. His liability in that case would rest on the terms of the Infants' Relief Act, and it has been held that under that Act a contract for necessities cannot be repudiated on the ground that it is partly executory.^a The infant must thus fulfill his contract or pay damages if he does not.

160a. What are necessities? It has always been held that an infant may render himself liable for the supply to him not merely of the necessities of life, but of things suitable to his station in life and to his particular circumstances at the time. The *locus classicus* on this subject is the judgment of Bramwell, B. in *Ryder v. Wombwell*,^b the conclusions of which were adopted by the Exchequer Chamber. In such cases the provinces of the court and the jury are as follows:

Evidence being given of the things supplied and of the circumstances and requirements of the infant, the court determines whether the things supplied can reasonably be considered necessities at all; and if it comes to the conclusion that they cannot, the case may not even be submitted to the jury.^c

Things may obviously be outside the range of possible necessities. "Earrings for a male, spectacles for a blind person, a wild animal, might be suggested."^d

Things may be of a useful character, but the quality or quantity supplied may take them out of the character of necessities. Elementary textbooks might be a necessary to a student of law, but not a rare edition of "Littleton's Tenures," or eight or ten copies of "Stephen's Commentaries." Necessaries also vary according to the station in life of the infant or his peculiar circumstances at the time. The quality of clothing suitable to an Eton boy would be unnecessary for a telegraph clerk; the medical attendance and diet required by an invalid would be unnecessary to one in ordinary health. It does not follow therefore that because a thing is of a useful class, a judge is bound to allow a jury to say whether or no it is a necessary.¹

^a *Roberts v. Gray*, [1913] 1 K.B. 520.
^c *Nash v. Inman*, [1908] 2 K.B. 1.

^b (1868) L.R. 3 Ex. 90; L.R. 4 Ex. 31.
^d Bramwell, B., in *Ryder v. Wombwell*.

¹ There is some confusion in the cases on this point, but the following propositions may be justified by authority and on principle: (1) It is for the court to say whether the consideration furnished is ever a necessary for any infant. (2) If it may be a necessary, it is for the court to say whether there is any evidence proper to submit to the jury that it is a necessary in the particular case at bar. The first proposition is applied in distinguish-

But if the judge conclude that the question is an open one, and that the things supplied are such as may reasonably be considered to be necessities, he leaves it to the jury to say whether, under the circumstances of the case, the things supplied were necessities in fact.¹ And the jury must then take into consideration the character of the goods supplied, the actual circumstances of the infant, and the extent to which the infant was already supplied with them. I say "actual circumstances," because a false impression conveyed to the tradesman as to the station and circumstances of the infant will not affect the infant's liability; if a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than they really are, or if he supplies goods of a useful class not knowing that the infant is already sufficiently supplied, he does so at his peril.²

^a *Naah v. Inman*, [1908] 2 K.B. 1.

ing between articles furnished for the benefit of the person and those furnished for the benefit of the estate of the infant; *Tupper v. Cadwell*, (1847, Mass.) 12 Met. 559; *Decell v. Lewenthal*, (1879) 57 Miss. 331; *House v. Alexander*, (1886) 105 Ind. 109; though it has been applied in somewhat general terms to personal benefits, as a college education. *Middlebury College v. Chandler*, (1844) 16 Vt. 683; *Turner v. Gaither*, (1880) 83 N.C. 357. The second proposition is merely the application of a general rule of procedure. *Rohan v. Hanson*, (1853, Mass.) 11 Cush. 44; *Pyne v. Wood*, (1888) 145 Mass. 558. See generally, 18 Am. St. Rep. 652 note.

¹ These have been held necessities: dentistry, — *Strong v. Foote*, (1875) 42 Conn. 203; attorney's services for personal defense, — *Barker v. Hibbard*, (1874) 54 N.H. 539; *Askey v. Williams*, (1889) 74 Tex. 294; to secure release from an asylum, — *In re Freshour's Est.*, (1913) 174 Mich. 114; but not for defense of estate, — *Phelps v. Worcester*, (1840) 11 N.H. 51; cf. *Epperson v. Nugent*, (1879) 57 Miss. 45; recognizance in a criminal proceeding, — *State v. Weatherwax*, (1874) 12 Kans. 463; a bridal outfit, — *Jordan v. Coffield*, (1874) 70 N.C. 110; and, in general, board, lodging, clothing, medical attendance, etc., — *Saunders v. Ott*, (1822, S.C.) 1 McCord, 572; *Price v. Sanders*, (1878) 60 Ind. 310. These have been held not necessities in particular cases: a buggy, — *Howard v. Simpkins*, (1883) 70 Ga. 322; a bicycle, — *Pyne v. Wood*, (1888) 145 Mass. 558; *Rice v. Butler*, (1899) 160 N.Y. 578; college education, — *Middlebury College v. Chandler*, (1844) 16 Vt. 683; professional education, — *Turner v. Gaither*, (1880) 83 N.C. 357. These are held generally not to be necessities: services or supplies for the benefit of the estate of the infant, — *Decell v. Lewenthal*, (1879) 57 Miss. 331; *House v. Alexander*, (1886) 105 Ind. 109; fire insurance, — *New Hampshire &c. Co. v. Noyes*, (1855) 32 N.H. 345; life insurance, — *Simpson v. Ins. Co.*, (1903) 184 Mass. 348; money, — *Randall v. Sweet*, (1845, N.Y.) 1 Denio, 460; *Price v. Sanders*, *supra*.

² It is settled law that one who supplies an infant with "necessaries" acts at his peril. *Trainer v. Trumbull*, (1886) 141 Mass. 827; *McKanna v. Merry*, (1871) 61 Ill. 177; *Johnson v. Lines*, (1843, Pa.) 6 Watts & S. 80 (oversupply). As to the pleading, see *Goodman v. Alexander*, (1900) 165 N.Y. 289.

"Having shown that the goods were suitable to the condition in life of the infant, he [the tradesman] must then go on to show that they were suitable to his actual requirements at the time of the sale and delivery. Unless he establishes that fact, either by evidence adduced by himself or by cross-examination of the defendants' witnesses, as the case may be, in my opinion he has not discharged the burden which the law imposes on him."

160b. Contracts for the infant's benefit. Contracts into which an infant may enter "by any existing or future statute or by rules of common law or equity" and which were not voidable at the date of the enactment, are not affected by the Act of 1874.

This second exception needs an explanation. We have to look for contracts which were not for necessities and yet even before the Act were not voidable. Such are to be found where an infant enters into a contract of service so as to provide him with the means of self-support.

"It has always been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence. The question has always been whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If so the Court will not allow the infant to repudiate it."^a

In the case cited an infant entered into a contract of service with a Railway Company, promising to accept the terms of an insurance against accidents in lieu of his rights of action under the Employers' Liability Act, 1880.^b It was held that the contract was, taken as a whole, for his benefit and that he was bound by his promise.^c And an infant may be held liable for the breach of such a contract under the Employers and Workmen Act of 1875.^d

On the other hand an agreement by an infant, on entering the service of a Sheffield newspaper, never during the rest of his life to become connected with any other newspaper within twenty miles of Sheffield was held in *Leng v. Andrews*^e to be more onerous than beneficial and the infant was entitled to repudiate it,

^a *Clements v. L. & N.W. R. Co.*, [1884] 2 Q.B. 482. (Followed in *Roberts v. Gray*, [1913] 1 K.B. 520, where the contract was executory.)

^b 43 & 44 Vict. c. 42.

^c [1893] 1 Q.B. 310; [1899] 2 Q.B. 1. No civil proceedings can, it seems, be taken against an infant on an apprenticeship deed; but if he misbehave he may be corrected by his master, or brought before a Justice of the peace. *De Francesco v. Barnum*, (1889) 43 Ch. D. 165; *Gylbert v. Fletcher*, (1630) Cro. Car. 179. A covenant in an apprenticeship deed to do or abstain from doing something after the apprenticeship has ceased may, however, be enforced by action: *Gadd v. Thompson*, [1911] 1 K.B. 304.

^d 38 & 39 Vict. c. 90; *Leslie v. Fitzpatrick*, (1877) 3 Q.B.D. 220. So too an undertaking by an infant to repay grants made by the Board of Education to enable him to become a teacher may be enforced against him in the event of his adopting another profession: 9 Edw. VII, c. 29, § 4.

^e [1906] 1 Ch. 763 (C.A.).

apart altogether from the question whether it was void as being in restraint of trade.

But if an infant's contract of service contain some stipulations which are for his benefit and others, clearly severable from the rest, which are not, he may be bound by the contract in part.^{a 1}

Judicial construction of section 2. The second section of the Act of 1874 makes it impossible for a man of full age to make himself liable upon a contract entered into during infancy (if one of that class of contracts which before the Act were invalid until affirmed), even though there be a fresh consideration for his ratification of such liability.

But we must note some points which are not quite obvious on reading the section.

In the first place it should be noted that though the contract cannot be enforced *against* the party making the contract during infancy, yet he may sue upon it. The words of the section do not avoid the contract; they only make it unenforceable against one of the parties to it. But though damages may be recovered, specific performance cannot be mutually enforced and in these circumstances an equitable remedy which is in the discretion of the court to grant and cannot be claimed as of right is not permitted to be at the service of the infant.

Secondly, the courts have been strict in their application of § 2 to contracts of the sort that, before the Act, were invalid unless ratified.

King, an infant, became liable to a firm of brokers for £547: after he came of age they sued him, and he compromised the suit by giving two bills of exchange for £50. The firm endorsed one of the bills to Smith, who sued upon it. The Queen's Bench Division held that the bills were a promise, based on a new consideration, to pay a debt contracted during minority, that here was a ratification of the sort contemplated by the Act, and that Smith could not recover.

"I think," said Charles, J., "that there was here a new consideration for the defendant's promise; but the section expressly says that no action shall be brought on such a promise even where there is a new consideration for it. The case of *ex parte Kibble*^b seems strongly to sup-

^a *Bromley v. Smith*, [1909] 2 K.B. 235.

^b (1875) L.R. 10 Ch. 373.

¹ The doctrine that contracts beneficial to the infant are valid is no longer accepted in the United States. See 16 A. & E. Enc. Law, 272; 14 R.C.L. 222. Even though the contract was a beneficial one to him, he has the power of disaffirmance. His retention of these benefits may prevent his recovering the consideration paid by him. See American note, *post*, §§ 161-161b.

port that view. In that case the plaintiff had obtained a judgment by default for a debt incurred by the defendant during infancy, and the judgment had been followed by a judgment debtor summons and a petition for an adjudication in bankruptcy. The court inquired into the consideration for the judgment, and finding that it was a debt contracted during infancy held that § 2 applied to the case, and dismissed the petition for adjudication."

In dealing with contracts other than those of debt the difficulty of distinguishing between the ratification of an old promise and the making of a new one has led to extreme refinements. Strictly construed the Act would make it impossible for a man to become liable on any agreement made during infancy however advantageous to him.

Where parties to mutual promises of marriage remain on the footing of an engaged couple after the promisor has attained his majority, the maintenance of the engagement has been held to be a ratification and therefore insufficient to sustain an action for breach of the promise.^a But where the mutual promises made during infancy are conditional on consent of the man's parents, and the promise is renewed by him after majority with their consent;^b or where an engagement is made during infancy with no date fixed for the marriage, and after attaining majority the parties agree to name a day on which it shall take place, the promises so made have been held to be new promises and the breach of them is actionable.^c

Lastly, the old distinction between contracts which were invalid until affirmed and those which were valid even at common law unless repudiated at majority still exists since the Act of 1874, which does not in any way affect the latter class. Three cases establish this important distinction.

An infant received an assignment of shares in 1883: he said he would repudiate them, but did not do so. He reached full age in 1886: in 1887 the company was wound up and he was not permitted to take his name off the list of contributories.^d

An infant became a member of a building society, received an allotment of land, and for four years after he came of age paid installments of the purchase money. Then he endeavored to repudiate the contract. He was not permitted to do so.^e

An infant became a party to a marriage settlement, under

^a *Coxhead v. Mullis*, (1878) 3 C.P.D. 439.

^b *Northcote v. Doughty*, (1879) 4 C.P.D. 385.

^c *Ditcham v. Worrall*, (1880) 5 C.P.D. 410.

^d *Is re Yeoland's Concoals*, (1888) 58 L.T. 922.

^e *Whittingham v. Murdy*, (1889) 60 L.T. 956.

which he took considerable benefits. Nearly four years after coming of age he repudiated the settlement. It was held that a contract of this nature was binding unless repudiated within a reasonable time of the attainment of majority, and that he was too late.^a

Reasonableness in respect of time must depend entirely on the circumstances of each case. A lapse of more than thirty years has been held not to bar the right to avoid a settlement made during infancy, but in that case the settlement had remained inoperative during the whole time, and the infant had been ignorant of its provisions.^b

161. American note. Infant's promise and subsequent ratification as legally operative facts.¹ The acts of an infant operate to create new legal relations whenever the acts of an adult would so operate. His acts are not void of legal effect.² One possible exception to this is the act of appointment of an agent; it has been held that such an act gives the agent no legal power whatever, and that the agent's subsequent acts in the infant's name are wholly void, not even creating in the infant the power to ratify or to disaffirm.³ Some courts restrict this exception to formal powers of attorney under seal;⁴ and at least one court has denied the exception altogether.⁵

The legal relations resulting from an infant's acts differ, however, from those resulting from the acts of an adult. This difference cannot be fully expressed by a general statement, such as "the contracts of an infant are voidable." Each relation should be considered separately: the *duties* of the infant and the correlative rights of the other party; the *rights* of the infant and the

^a *Carter v. Silber*, [1892] 2 Ch. (C.A.) 278; *Edwards v. Carter*, [1893] A.C. 360. Note however that by the Infants' Settlement Act, 1855, a male infant if over twenty and a female infant if over seventeen, can, with the sanction of the court, make a binding marriage settlement; and this may be done either before or after the marriage. 18 & 19 Vict. c. 43, § 1; *Lovett v. Lovett*, [1898] 1 Ch. 82.

^b *Farrington v. Forrester*, [1893] 2 Ch. 461.

¹ §§ 161, 161a, and 161b are by the American editor.

² When sued upon his deed executed during infancy, the infant could not plead *non est factum*; it was necessary to plead infancy specially. See *Zouch v. Parsons*, (1765) 3 Burr. 1794. It was otherwise in the case of a deed of a married woman. See note in 18 Am. St. Rep. 574.

³ *Waples v. Hastings*, (1842 Del.) 3 Har. 403; *Trueblood v. Trueblood*, (1856) 8 Ind. 195; *Poston v. Williams*, (1903) 99 Mo. App. 513.

⁴ *Hastings v. Dollarhide*, (1864) 24 Cal. 195; *Whitney v. Dutch*, (1817) 14 Mass. 462; *Hardy v. Waters*, (1853) 38 Me. 450; *Patterson v. Lippincott*, (1885) 47 N.J. L. 457; 18 Am. St. Rep. 629-33; *Huffcut on Agency*, § 15.

⁵ *Coursolle v. Weyerhauser*, (1897) 69 Minn. 328. The matter is sometimes regulated by statute. *Stimson, Am. St. Law*, § 6602.

correlative duties of the other; likewise their *privileges*, *powers*, and *immunities* with the correlative no-rights, liabilities, and disabilities.

These legal relations will, of course, vary with the particular act performed by the infant. Certain relations will follow his act of promising and others will follow his act of performing as promised or his act of conveyance of property. We shall first consider his executory promises.

Where there has been no ratification, the non-performance by an infant of the acts he contracted to perform never operates to create in the other party a right to damages. He can neither maintain suit in debt for the agreed amount nor in *assumpsit* for his damages, nor can he deduct such damages from the infant's claim for *quantum meruit*.¹ This rule is not affected by the fact that the infant received value and still retains the same, in specie or otherwise.²

The executory promise of an infant creates no legal or equitable duty whatever. Nevertheless, the promise and the consideration given for it are operative facts that constitute a sufficient consideration for a new promise made after majority. They operate, therefore, to create in the infant from the time he reaches his majority the *legal power* to create a duty and other new legal relations by mere promissory words.³ This is a power that but for the previous operative facts he would not have. After a ratification the *cause of action* against the quondam infant consists of *all* of the following facts: the infant's promise, the consideration given therefor, and the ratification. Thus it has been held that a ratification by the defendant *after* the plaintiff has brought suit is not sufficient to sustain that action.⁴

The new promise may not be co-extensive in terms with the

¹ *Derocher v. Continental Mills*, (1870) 58 Me. 217; *Johnson v. Northwestern M.L. Ins. Co.*, (1894) 56 Minn. 365 (*semble*); *Bailey v. Barnberger*, (1850, Ky.) 11 B. Mon. 113; *Wallace v. Leroy*, (1905) 57 W.Va. 263.

An agreement of an infant employee not to solicit the trade of his employer's customers after leaving his employ was enforced by injunction in *Mutual Milk & C. Co. v. Prigge*, (1906) 112 N.Y. App. D. 652, and in *Fellows v. Wood*, (1888) 59 L.T. 513. These two cases seem to be justifiable on special grounds.

² But cf. *Lane v. Dayton Coal & Iron Co.*, (1899) 101 Tenn. 581.

³ "They remain a legal *substratum* for future assent." *Whitney v. Dutch*, (1817) 14 Mass. 462.

⁴ *Merriam v. Wilkins*, (1833) 6 N.H. 432; *Thornton v. Illingworth*, (1824) 2 B. & C. 824; *Ford v. Phillips*, (1822, Mass.) 1 Pick. 202; *Freeman v. Nichols*, (1885) 138 Mass. 313; *Hyer v. Hyatt*, (1827) 3 Cranch, C.C. 276, Fed. Cas. No. 6,977. *Contra*: *Wright v. Steele*, (1819) 2 N.H. 51; *Best v. Givens*, (1842, Ky.) 3 B. Mon. 72.

former one; it may be conditional, and the performance promised need not be identical with that previously promised. The extent of the duty is determined by the new promise or ratification.¹ Courts have expended some useless effort in such cases in determining whether the suit is "on the original promise" or on the new promise.² The truth is that *both* are necessary operative facts. As soon as the fact of the defendant's infancy appears, it is evident that the plaintiff has no case in the absence of a ratification or new promise. Observe that the question here is not whether or not a particular declaration is demurrable, but is whether or not the actual facts now existing show that the defendant owes a legal duty to the plaintiff. The plaintiff's real *cause of action* may be alleged piecemeal, in his declaration, his replication, his surrejoinder, and his surrebutter, but it is the whole that is his cause of action.

A ratification creates a duty as of its own date. It does not, by any fiction of relation back, cause previous gifts of property by the promisor to be regarded as in fraud of the creditor now claiming under the ratification and hence voidable by him.³

161a. Ratification. What acts operate as such. After becoming of age, an infant has the legal power to ratify and confirm any contract made by him during infancy. Prior thereto he has no such power and an attempted ratification is ineffective.⁴ Until there is a binding ratification the contract may be disaffirmed, and the problem is what acts will operate as a ratification.⁵ The solution of this problem requires careful consideration of the nature of the contract and the acts that have been done in the performance of it.⁶

(1) *Express ratification.* Ratification may take place by express words indicating an intention to confirm the contract. These words may consist of a new express promise,⁷ or such

¹ *Thompson v. Lay*, (1826, Mass.) 4 Pick. 48; *Edgerly v. Shaw*, (1852) 25 N.H. 514; *Minock v. Shortridge*, (1870) 21 Mich. 304, 316. See *ante*, § 151, note.

² See *West v. Penny*, (1849) 16 Ala. 186.

³ *Edmunds v. Mister*, (1881) 58 Miss. 765. *Contra*, *Palmer v. Miller*, (1857, N.Y.) 25 Barb. 399.

⁴ *Corey v. Burton*, (1875) 32 Mich. 30; *Sanger v. Hibbard*, (1900) 104 Fed. 455. As to contracts made by the agent of an infant see the preceding section.

⁵ *Buchanan v. Hubbard*, (1889) 119 Ind. 187.

⁶ *Boody v. McKenney*, (1844) 23 Me. 517.

⁷ *Wright v. Steele*, (1819) 2 N.H. 51; *Hatch v. Hatch's Estate*, (1887) 60 Vt. 160; *Jackson v. Mayo*, (1814) 11 Mass. 147.

Some American states require a ratification of debts contracted during infancy to be in writing. See § 94, *ante*; 18 Am. St. Rep. 707; *Stimson, Am. St. Law*, § 4147.

words as "I do ratify and confirm."¹ A mere acknowledgment that the contract was in fact made and that it has not been performed is not sufficient as a ratification.² It is sometimes said that a ratification is ineffective unless made with knowledge of the possession of a legal power to disaffirm,³ but the cases holding the contrary seem to have the better reason.⁴

(2) *Tacit ratification.* Conduct other than words may be sufficient evidence of an intention to ratify, or may be held to terminate the power of disaffirmance in spite of an intention not to ratify. Instances of such conduct are: the bringing of a suit, acceptance of the consideration, dealing as owner after full age with the consideration received during minority, remaining in the service of an employer after full age under a contract made during minority.⁵

Silent acquiescence, or a mere failure to disaffirm, unaccompanied by the enjoyment of benefits derived from the contract, will not generally be held to amount to a ratification.⁶ If such acquiescence continues for the entire period of limitation, the other party may have his title to property made good by adverse possession.

Where property has been vested in the infant by virtue of the

¹ *Thompson v. Lay*, (1826, Mass.) 4 Pick. 48; *Hale v. Gerrish*, (1836) 8 N.H. 374.

² *Proctor v. Sears*, (1852, Mass.) 4 Allen, 95; *Ford v. Phillips*, (1822, Mass.) 1 Pick. 202; *Hale v. Gerrish*, *supra*. But see *Henry v. Root*, (1865) 33 N.Y. 526; *Hatch v. Hatch's Estate*, *supra*. The real question is whether or not the words of ratification really express a present intention to confirm. Courts have drawn the inference of such an intention with varying degrees of liberality. See *Whitney v. Dutch*, (1817) 14 Mass. 462.

A mere *part payment* has been held not to be a ratification. *Catlin v. Haddox*, (1882) 49 Conn. 492.

³ *Turner v. Gaither*, (1880) 83 N.C. 357; *Trader v. Lowe*, (1876) 45 Md. 1; *Hinely v. Margaritz*, (1846), 3 Pa. 428.

⁴ *Morse v. Wheeler*, (1852, Mass.) 4 Allen, 570; *Clark v. Van Court*, (1880) 100 Ind. 113; *Anderson v. Soward*, (1883) 40 Ohio St. 325; *Bestor v. Hickey*, (1898) 71 Conn. 181; and see 18 Am. St. Rep. 705, note.

⁵ *Middleton v. Hoge*, (1869, Ky.) 5 Bush, 478; *Keegan v. Cox*, (1874) 116 Mass. 289; *Jones v. Phoenix Bank*, (1853) 8 N.Y. 228; *Clark v. Van Court*, (1880) 100 Ind. 113; *Spicer v. Earl*, (1879) 41 Mich. 191. But see *Burdett v. Williams*, (1887) 30 Fed. 697; *McCarty v. Carter*, (1868) 49 Ill. 53; *Tobey v. Wood*, (1877) 123 Mass. 88.

⁶ *Green v. Green*, (1877) 69 N.Y. 553; *Wells v. Seixas*, (1885) 24 Fed. 82; *Sims v. Everhardt*, (1880) 102 U.S. 300; *Prout v. Wiley*, (1873) 28 Mich. 164; *Donovan v. Ward*, (1894) 100 Mich. 601. *Contra*: *Hastings v. Dollarhide*, (1864) 24 Cal. 195; *Goodnow v. Empire Lumber Co.*, (1884) 31 Minn. 468; *Weeks v. Wilkins*, (1904) 134 N.C. 516. But silence coupled with other circumstances may work an estoppel to disaffirm. *Irvine v. Irvine*, (1869, U.S.) 9 Wall. 617; *Ihley v. Padgett*, (1887) 27 S.C. 300; *Buchanan v. Hubbard*, (1889) 119 Ind. 187.

contract, his continued retention and enjoyment thereof for more than a reasonable time after his majority will be held to be a ratification.¹ A sale of such property after majority is a ratification;² of course, a sale during infancy is not.³

161b. **Disaffirmance, and the legal relations consequent thereon.** Disaffirmance is an operative act whereby the legal relations created by an infant's contract are terminated and discharged and other legal relations substituted. Inasmuch as the infant's executory promise does not operate to create any legal duty in him (the infant being at all times at liberty or *privileged* not to perform), his disaffirmance is not the discharge of such a duty. A return promise by an adult, however, creates a legal duty and the infant has a correlative right *in personam*. A disaffirmance terminates these. If, in the performance of the contract, property in either land or chattels has been conveyed, a disaffirmance vitally changes the legal relations constituting such property. If service has been rendered, disaffirmance may create a right to recover its value. These matters require consideration in detail.

(1) *Who has the power of disaffirmance and how is it exercised.* The power of disaffirmance is usually said to be personal to the infant only.⁴ An adult contracting with the infant certainly has no such power.⁵ Under some circumstances the guardian of the infant has the power to disaffirm,⁶ and in some cases the heir or personal representative of the infant has been held to have such power.⁷ The infant's devisees and legatees have no such power,⁸ nor has his assignee in insolvency⁹ or any other assignee.¹⁰

¹ *Boyden v. Boyden*, (1845, Mass.) 9 Metc. 519; *Buchanan v. Hubbard*, (1889) 119 Ind. 187; *Callis v. Day*, (1876) 38 Wis. 643; *Henry v. Root*, (1865) 33 N.Y. 526; *Johnston v. Gerry*, (1904) 34 Wash. 524.

² *Ready v. Pinkham*, (1902) 181 Mass. 351; *Cheshire v. Barrett*, (1827, S.C.) 4 McCord, 241; *Boody v. McKenney*, (1844) 23 Me. 517; *Hilton v. Shepherd*, (1898) 92 Me. 160. In *Hobbs v. Hinton, etc. Co.*, (1914) 74 W. Va. 443, the buyer was held not to have ratified by retaining the property for three months after majority, receiving benefits of use, paying part of the price, and making an offer to sell it. See note in Ann. Cas. 1917 D, 413.

³ *Walsh v. Powers*, (1870) 43 N.Y. 23; *Ison v. Cornett*, (1903) 116 Ky. 92.

⁴ See *Mansfield v. Gordon*, (1887) 144 Mass. 168; *Hastings v. Dollarhide*, (1864) 24 Cal. 195. See extended note in 18 Am. St. Rep. 573-724.

⁵ *Holt v. Ward Clarendieux*, (1732) 2 Str. 937; *Harris v. Musgrove*, (1883) 59 Tex. 401. But equity will not decree specific performance against the adult. *Flight v. Bolland*, (1828) 4 Russ. 298.

⁶ *Chandler v. Simmons*, (1867) 97 Mass. 508.

⁷ *Walton v. Gaines*, (1895) 94 Tenn. 420; *Harvey v. Briggs*, (1890) 68 Miss. 60; *Linville v. Greer*, (1901) 165 Mo. 380.

⁸ *Bozeman v. Browning*, (1876) 31 Ark. 364.

⁹ *Mansfield v. Gordon*, *supra*. ¹⁰ *Riley v. Dillon*, (1906) 148 Ala. 233.

A disaffirmance may consist of any overt act expressing an intention of exercising the power. It may be by an express notice, by a re-entry upon land conveyed, by a demand for the return of chattels, or by other conduct inconsistent with the previous contract.¹ An infant's conveyance of land may be disaffirmed by making a new conveyance by warranty deed after majority.² Perhaps a will may be so drawn as to be a disaffirmance (as where property previously conveyed is specifically devised), but a will merely leaving "all his property, both real and personal" is no disaffirmance,³ nor is a general assignment in insolvency.⁴

(2) *When does the power to disaffirm exist?* In all cases, except where he has made a conveyance of land, the infant has the power to disaffirm at any time after the making of the contract and prior to ratification. All of his executory contracts and all executed contracts involving personal property only can be disaffirmed by the infant during infancy as well as after majority.⁵ A disaffirmance, whether made prior to majority or thereafter, is final and cannot itself be disaffirmed.⁶

It has been held in numerous cases that the infant's conveyance of land cannot be disaffirmed until he becomes of age.⁷ Such a general statement requires some limitation, however, and it may be based in part upon the common-law doctrine that a

¹ *Harris v. Cannon*, (1849) 6 Ga. 382; *McCarty v. Woodstock Iron Co.*, (1890) 92 Ala. 463.

² *Riggs v. Fisk*, (1878) 64 Ind. 100; *Craig v. Van Bebber*, (1890) 100 Mo. 584. The question whether the new deed operates to convey legal title, in cases where the first grantee still retains possession, depends upon the law of the jurisdiction with reference to conveyances by one disseised. That such a conveyance is not valid, see *Harris v. Cannon*, *supra*; *Riggs v. Fisk*, *supra*. *Contra*, *Cresinger v. Welch's Lessee*, (1846) 15 Ohio, 156. A quitclaim deed is no disaffirmance because not necessarily inconsistent with the previous deed. *Singer Mfg. Co. v. Lamb*, (1883) 81 Mo. 221. *Contra*, *Bagley v. Fletcher*, (1884) 44 Ark. 153.

³ *Boseman v. Browning*, *supra*.

⁴ *Mansfield v. Gordon*, *supra*.

⁵ *Stafford v. Roof*, (1827, N.Y.) 9 Cow. 626; *Towle v. Dresser*, (1882) 73 Me. 252; *Pippen v. Ins. Co.*, (1902) 130 N.C. 23; *Chapin v. Shafer*, (1872) 49 N.Y. 407; *Nichols v. Snyder*, (1900) 78 Minn. 502. *Contra*, *Lansing v. Mich. Cent. R.R. Co.*, (1901) 126 Mich. 663.

⁶ *Edgerton v. Wolf*, (1856, Mass.) 6 Gray, 453; *McCarty v. Woodstock Iron Co.*, *supra*.

⁷ *Singer Mfg. Co. v. Lamb*, (1883) 81 Mo. 221; *Shipley v. Bunn*, (1894) 125 Mo. 445 (infant cannot maintain ejectment); *Stafford v. Roof*, (1827, N.Y.) 9 Cow. 626 (*semble*); *Doe v. Leggett*, (1862) 53 N.C. 425 (ejectment refused). In the following cases a demurrer was sustained to a bill by the infant asking cancellation, a quieting of title, and possession: *Irvine v. Irvine*, (1860) 5 Minn. 61; *Cummings v. Powell*, (1852) 8 Tex. 80; *Welch v. Bunce*, (1882) 83 Ind. 382.

conveyance could not be made when land was in the adverse possession of another. It appears that the infant has the right and privilege of entry.¹ Such an entry would seem to terminate the grantee's right of possession, his privilege of use, and, in most states at least, his power to convey title. This nullifies, in large measure, the effect of the previous deed. No very good reason is apparent why such a re-entry should not again invest the infant with the same power of conveyance that he had in the first place, now that the land is no longer in the adverse possession of another, but this power he seems not to regain before majority. Likewise, the infant's re-entry does not terminate his power of ratification after majority.

(3) *Effect of infant's false representation as to his age.* The fact that the infant falsely represented himself to be of age, and thus induced the other party to contract with him, does not affect his power of disaffirmance. He is not bound by estoppel.² In England, the court of equity showed some disposition to lay down the contrary rule,³ but it has not been followed in the United States.⁴

(4) *The right of restitution after disaffirmance.* (a) *The right of the infant.* After an effective disaffirmance the infant has a right to recover back the specific *res* transferred by him, if it is still in existence. This right is enforceable in replevin or in trover in case the holder of the *res* refuses to give it up on demand,⁵ even though such holder is an innocent purchaser for value.⁶ A disaffirmance has no effect (by the fiction of relation back) to make tortious the acts of the transferee done prior to the disaffirm-

¹ *Stafford v. Roof*, *supra* (*semble*); *Bool v. Mix*, (1837, N.Y.) 17 Wend. 119 (*semble*); *Matthewson v. Johnson*, (1840, N.Y.) 1 Hoff. Ch. 560 (*semble*); *Cummings v. Powell*, *supra* (*semble*).

² *Merriam v. Cunningham*, (1853, Mass.) 11 Cush. 40; *Bartlett v. Wells*, (1862) 1 Best & S. 836; *New York Bldg. L. & B. Co. v. Fisher*, (1897, N.Y.) 23 App. Div. 363; *Carpenter v. Carpenter*, (1873) 45 Ind. 142.

³ *Watts v. Creswell*, 9 Vin. Abr. 415; *Ex parte Unity*, etc. Ass'n, (1858) 3 De Gex & J. 63; *Levene v. Brougham*, (1908) 24 T.L.R. 801.

⁴ In *Sims v. Everhardt*, (1880) 102 U.S. 300, it was held that the falsehood would not prevent the granting of affirmative equitable relief to the infant. Some cases refuse equitable relief to such an infant. *Schmitheimer v. Eiseman*, (1870, Ky.) 7 Bush. 298. In one case equity granted an injunction preventing the infant from enforcing his judgment in ejectment obtained after a disaffirmance. *Ferguson v. Bobo*, (1876) 54 Miss. 121.

⁵ *Towle v. Dresser*, (1882) 73 Me. 252.

⁶ *Hill v. Anderson*, (1845, Miss.) 5 Sm. & M. 216; *Brantley v. Wolf*, (1882) 60 Miss. 420 (land); *Wallace v. Leroy*, (1905) 57 W.Va. 263 (*semble*); *Downing v. Stone*, (1891) 47 Mo. App. 144.

ance.¹ If the value given by the infant consisted of money (and hence not traceable), or of services, or of some *res* that no longer exists *in specie*, he can sue his transferee in quasi-contract for the value thereof.²

There is much conflict as to whether the infant must return or tender the consideration received by him as condition precedent to his right of restitution. It is often stated that an infant cannot recover the consideration paid by him unless he can and does return the value that he received from the defendant.³ Some of the cases so holding would be sustainable under the following rule, laid down by one court: Where the contract was fair and reasonable and not detrimental to the infant, and where he received value that was in itself as beneficial to his estate as was that which he gave, he cannot recover the latter without returning the consideration received by him.⁴ No doubt most of the English cases holding that an infant is bound by his contracts if they are beneficial to him fall within the foregoing principle.⁵

It is often held that if during infancy the infant has wasted what he received, he may recover from the defendant all that he paid or gave.⁶ Probably the majority of American cases lay down the rule that an infant can in all cases disaffirm and recover the consideration given by him without first returning what he received.⁷ This last rule is held in all courts to

¹ *Fitts v. Hall*, (1838) 9 N.H. 441; *Drude v. Curtis*, (1903) 183 Mass. 317; *Lamkin v. Ledoux*, (1906) 101 Me. 581.

² *Derocher v. Continental Mills*, (1870) 58 Me. 217 (the defendant cannot recoup his damages caused by plaintiff's non-performance); *Waugh v. Emerson*, (1885) 79 Ala. 295 (defendant can reduce plaintiff's claim by proving value paid by the defendant); *Weaver v. Jones*, (1854) 24 Ala. 420 (defendant bound to pay for use and occupation of land with a reduction for improvements).

The infant also has a quasi-contractual right to compensation for services and feed furnished by him to cattle bought from the adult and now returned. *Tower-Doyle Com. Co. v. Smith*, (1900) 86 Mo. App. 490.

³ *Rice v. Butler*, (1899) 160 N.Y. 578; *Bartholomew v. Finnemore*, (1854, N.Y.) 17 Barb. 428; *Hillyer v. Bennett*, (1838, N.Y.) 3 Edw. Ch. 222 (relief in equity denied); *Bailey v. Barnberger*, (1850, Ky.) 11 B. Mon. 113; *Lane v. Dayton Coal & Iron Co.*, (1899) 101 Tenn. 581; *Hall v. Butterfield*, (1879) 59 N.H. 354; *Kerr v. Bell*, (1869) 44 Mo. 120.

⁴ *Johnson v. Northwestern M.L. Ins. Co.*, (1894) 56 Minn. 365

⁵ See *Clements v. London & N.W. Ry. Co.*, [1894] L.R. 2 Q.B.D. 482; *Holmes v. Blogg*, (1818) 8 Taunt. 506. Cf. *Fellows v. Wood*, (1888) 59 L.T. 513.

⁶ *Green v. Green*, (1877) 69 N.Y. 553; *Eureka Co. v. Edwards*, (1881) 71 Ala. 248; *Brantley v. Wolf*, (1882) 60 Miss. 420; *Harvey v. Briggs*, (1890) 68 Miss. 60; *Craig v. Van Bebber*, (1890) 100 Mo. 584.

⁷ *Miller v. Smith*, (1879) 28 Minn. 248 (he had wasted what he received).

apply in cases where the infant has conveyed away his real property.¹

(b) *The rights of the other party.* If the infant still retains *in specie* what he has received, his disaffirmance reverts title thereto in the other party, with the usual consequences thereof. The infant is not liable in a tort action for his acts prior to disaffirmance, but a subsequent refusal to give up a chattel that is still in his possession is a wrongful conversion.²

If the infant does not retain *in specie* what he received, but he still has its value in some other form, he can be compelled in equity to give up this value.³ This recovery is quasi-contractual in character, and should be allowed in *indebitatus assumpsit* as well as in equity. If the consideration received has been wasted during infancy the adult is generally held to have no remedy.⁴

The following appears to be a just and equitable rule: Where the value given by an infant is greater than the value received, he can recover the difference. He can recover the whole of that given by him if he can and does put the other party *in statu quo* by returning all the value received. Where the value given by the defendant to the infant has been squandered or lost during infancy in such fashion that it cannot now be traced or its value recovered and in the opinion of the jury the value given by the infant to the defendant would not have been so squandered or lost, then the infant can recover the whole value of that which he gave to the defendant.

162. *Liability of infant for tort.* An infant is liable for wrong; but a breach of contract may not be treated as a wrong so as to make the infant liable; the wrong must be more than a misfea-

Gillis v. Goodwin, (1901) 180 Mass. 140; Simpson v. Prudential Ins. Co., (1903) 184 Mass. 348; Carpenter v. Carpenter, (1873) 45 Ind. 142; Morse v. Ely, (1891) 154 Mass. 458; Dill v. Bowen, (1876) 54 Ind. 204; Barr v. Packard Motor Co., (1912) 172 Mich. 299; Reynolds v. Garber-Buick Co., (1914) 183 Mich. 157.

¹ Johnson v. Northwestern M.L. Ins. Co. *supra* (seemle); Chandler v. Simmons, (1867) 97 Mass. 508; Ison v. Cornett, (1903) 116 Ky. 92.

² Chandler v. Simmons, *supra* (seemle); Ison v. Cornett, *supra* (seemle); Bennett v. McLaughlin, (1883) 13 Ill. App. 349; Badger v. Phinney, (1819) 15 Mass. 359; Strain v. Wright, (1849) 7 Ga. 568; Fitts v. Hall, (1838) 9 N.H. 441. The infant has been given a lien on cattle for food and service while they were in his possession. Tower-Doyle Corn. Co. v. Smith, (1900) 86 Mo. App. 490. Where an infant has received a deed to land, the grantor is entitled to cancellation in equity upon disaffirmance by the infant. McCarty v. Woodstock Iron Co., (1890) 92 Ala. 463.

³ Ison v. Cornett, *supra*. MacGreal v. Taylor, (1896) 167 U.S. 688.

⁴ See note 6, preceding page.

sance in the performance of the contract, and must be separate from and independent of it. Thus where an infant hired a mare to ride and injured her by over-riding, it was held that he could not be made liable upon the contract by framing the action in tort for negligence,^{a 1} and an infant who has obtained a loan by falsely representing his age cannot be made to pay the amount of the loan in the form of damages in an action for fraudulent misrepresentation.^b Nor can an infant be made liable for goods sold and delivered by charging him in trover and conversion;^c for though by the Infants' Relief Act contracts for goods supplied to an infant are absolutely void, yet the delivery of goods to him with intent to pass the property in them vests the title in the infant, in exactly the same manner as a gift of property coupled with delivery vests the title in the donee.^d The tradesman has, in other words, made a gift of the goods to the infant, though he could not sell them to him.

But when an infant hired a horse expressly for riding and not for jumping, and then lent it to a friend who jumped the horse and killed it, he was held liable: for "what was done by the defendant was not an abuse of the contract, but was the doing of an act which he was expressly forbidden by the owner to do with the animal."^{d 2}

A butcher boy appropriated some of the meat which he was employed to carry to his master's customers; he sold it and kept the money. He was detected, an account was made of the money due from him, which he acknowledged to be correct, and when he came of age he gave a promissory note for the amount. He was held liable for the amount. It was argued that the liability

^a *Jennings v. Rundall*, (1799) 8 T.R. 335.

^b *Lealie v. Sheill*, [1914] 3 K.B. 607.

^c *Stocks v. Wilson*, [1913] 2 K.B. 235.

^d *Burnard v. Haggis*, (1863) 14 C.B. (N.S.) 45.

¹ *Young v. Muhling*, (1900) 48 N.Y. App. Div. 617; *Eaton v. Hill*, (1870) 50 N.H. 235; *Lowery v. Cate*, (1901) 108 Tenn. 54. Some states hold an infant liable in tort for deceit if by misrepresenting his age he obtains the property of another. *Fitts v. Hall*, (1838) 9 N.H. 441; *Rice v. Boyer*, (1886) 108 Ind. 472. But *contra*, *Slayton v. Barry*, (1900) 175 Mass. 513, and cases cited. In no case will misrepresentation as to age estop an infant from disaffirming his contract. *Studwell v. Shapter*, (1873) 54 N.Y. 249; *Merriam v. Cunningham*, (1853, Mass.) 11 Cush. 40; *New York Building &c. Co. v. Fisher*, (1897) 23 N.Y. App. Div. 363; *Quigg v. Quigg*, (1903) 42 N.Y. Misc. 48 (marriage); *Sims v. Everhardt*, (1880) 102 U.S. 300. But see *Schmitzheimer v. Eiseman*, (1870, Ky.) 7 Bush, 298; *Stimson*, Am. St. Law, § 6602.

² *Slayton v. Barry*, *supra*; *Fitts v. Hall*, (1838) 9 N.H. 441.

³ *Eaton v. Hill*, *supra*; *Homer v. Thwing*, (1826, Mass.) 3 Pick. 492; *Churchill v. White*, (1899) 58 Neb. 22; *Freeman v. Boland*, (1882) 14 R.I. 39.

arose on an account stated, which was void under § 1, or on a ratification which was unenforceable under § 2. But the court held that he was liable to an action *ex delicto*, and that his promise to pay when he came of age was the compromise of a suit, for which, being of age, he was competent to contract.^a ¹

But though in the case of the infant who obtains goods or money due to fraudulent misrepresentation as to his true age, no common-law action can for the reasons already given be brought against him for damages for the fraud, the courts of equity nevertheless contrived a remedy of their own for the defrauded tradesman or lender. Since the Judicature Acts this remedy, the scope of which seems not to have been fully appreciated in recent years, is now available in all divisions of the High Court, and is thus described in *Stocks v. Wilson*:^b

"What the court of equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages or compensation for the loss of the other party's bargain. If the infant has obtained property by fraud he can be compelled to restore it; if he has obtained money he can be compelled to refund it. If he has not obtained either, but has only purported to bind himself by an obligation to transfer property or to pay money, neither in a court of law nor a court of equity can he be compelled to make good his promise or to make satisfaction of its breach. . . . The cases in which the principle has been applied are (1) cases where the infant by his fraud has obtained possession of property which he still retained at the time the suit or action was brought, and (2) cases where the infant has obtained money by the fraud. Thus in *Lemprière v. Lange* ^c the court held that the lease of a furnished house which an infant had obtained by a fraudulent misrepresentation as to his age must be cancelled and the property given up. The same principle would no doubt apply to the conveyance of a freehold estate."

The remedy in such a case is not a remedy on the contract; it is an equitable remedy for the fraud, and is therefore not affected by the Infants' Relief Act. In the case cited the infant, who had sold part of the goods and pledged the remainder as security for an advance, was held liable to account to the plaintiff for the money which he had thus received and to pay it over to him.

^a *In re Seager*, (1889) 60 L.T. 665.

^b [1913] 2 K.B. 235, 242, 249.

^c (1879) 12 Ch. D. 675.*

* Cf. *ex parte Unity, etc. Ass'n*, (1858) 3 De Gex & J. 63; *Bennetto v. Holden*, (1874, Ont.) 21 Grant, Ch. 222.

¹ A note given for a tort was held binding in *Ray v. Tubbs*, (1878) 50 Wt. 688. But see *Hanks v. Deal*, (1825, S.C.) 3 McCord, 257.

3. Corporations

163. Necessary contractual limitations. A corporation is an artificial person created by law. Hence the limitations to the capacity of a corporation for entering into a contract may be divided into necessary and express. The very nature of a corporation imposes some necessary restrictions upon its contractual power (e.g., it cannot contract to marry), and the terms of its incorporation may impose others.

A corporation has an existence separate and distinct from that of the individuals who compose it; their corporate rights and liabilities are something apart from their individual rights and liabilities; they do not of themselves constitute the corporation, but are only its members for the time being.¹

Thus a corporation, having this ideal existence apart from its members, is impersonal, and must contract by means of an agent. It "cannot act in its own person, for it has no person."^a

It follows also that a corporation must give some formal evidence of the assent of its members to any legal act which, as a corporation, it may perform. Hence the requirement that a corporation must contract under seal.²

The exceptions to this requirement have been dealt with elsewhere. It should however be noticed that where a corporation either expressly, or by the necessary construction of the terms of its incorporation, has power to make negotiable instruments,³ exception is made by the Bills of Exchange Act (1882)^b to the general rule that by the law merchant an instrument under seal is not negotiable.⁴ Before this Act a trading corporation whose

^a *Ferguson v. Wilson*, (1866) 2 Ch. 89.

^b 45 & 46 Vict. c. 61 § 91 (2).

¹ For example, a deed of corporate lands executed by all the members of the corporation would not convey the corporate title. *Wheelock v. Moulton*, (1843) 15 Vt. 519. If one person acquires all the stock, the corporation is still a distinct legal entity. *Randall v. Dudley*, (1897) 111 Mich. 437; *Harrington v. Connor*, (1897) 51 Neb. 214; 19 L.R.A. 684 note.

Space cannot be taken here for a criticism of the theory of corporate entity. To the present editor, such an "entity" seems to be merely a work of constructive imagination. However, the law of corporations has been worked out by means of this fiction, and it is still properly usable as a short-hand method of describing the legal relations of the flesh and blood individuals involved.

² But see *ante*, § 91.

³ In the United States a corporation has the implied power to make negotiable paper as evidence of any debt which it has authority to contract. *Moss v. Averell*, (1853) 10 N.Y. 449; *Comm. v. Pittsburgh*, (1861) 41 Pa. 278; *Rockwell v. Elkhorn Bk.*, (1861) 13 Wis. 653; *Auerbach v. Le Sueur Mill Co.*, (1881) 28 Minn. 291.

⁴ A negotiable instrument executed by a corporation under seal is not

business it might be to make such instruments could render them valid by the signature of an agent duly appointed, but the validity of a bill or note made under the seal of a corporation was doubtful.

164. **Express contractual limitations.** The express limitations upon the capacity of corporate bodies must vary in every case by the terms of their incorporation. Much has been and still may be said as to the effect of these terms in limiting the contractual powers of corporations, but we cannot here discuss the doctrine of "ultra vires." The question whether the terms of incorporation are the measure of the contracting powers of the corporation, or whether they are merely prohibitory of contracts which are inconsistent with them, was discussed at length in the much litigated case of the *Ashbury Carriage Company v. Riche*;^a and the results of this and other cases point to a distinction between two kinds of corporations.

A common-law corporation, that is, a corporation created by charter, in virtue of the royal prerogative, can deal with its property, or bind itself by contract like an ordinary person, subject always to such special directions given in the charter as might make certain contracts inconsistent with the objects of its creation.^{b 1}

But a corporation created by or in pursuance of statute is limited to the exercise of such powers as are actually conferred, or may reasonably be deduced from the language of the statute.^c And thus a company incorporated under the Companies Acts is bound by the terms of its memorandum of association to make no contracts inconsistent with, or foreign to, the objects set forth in the memorandum.^{d 2}

^a (1875) L.R. 7 H.L. 653.

^b See *Baroness Wenlock v. River Dee Co.*, (1883) 36 Ch. at p. 685, note.

^c *Osborne v. Amalgamated Soc. of Ry. Servants*, [1910] A.C. 87.

^d *Ashbury Carriage Co. v. Riche*, (1875) L.R. 7 H.L. 653.

thereby rendered non-negotiable unless such was the intent of the corporation in affixing the seal. Therefore unless the instrument itself contains a recital as to the seal, or it is shown by extrinsic evidence that the seal was affixed by authority for the purpose of creating a specialty, the negotiable character of the instrument is not affected. *Bank v. Railroad Co.*, (1873) 5 S.C. 156; *Mackay v. Saint Mary's Church*, (1885) 15 R.I. 121; *Jones v. Horner*, (1869) 60 Pa. 214; *Chase N.B. v. Faurot*, (1896) 149 N.Y. 532. See also *American Neg. Inst. Law*, § 6 (N.Y. § 25).

¹ In the United States corporations are created only by the legislature. *Stowe v. Flag*, (1874) 72 Ill. 397; *Atkinson v. Railroad Co.*, (1864) 15 Ohio St. 21.

² "In respect of the power of corporations to make contracts, two propositions may be stated: (1) That they have, by mere implication of law and

The Companies (Consolidation) Act, 1908,^a enables such a company to alter its memorandum under certain conditions and for certain objects, e.g., the furtherance of its business, the addition of cognate business or the abandonment of some of its original objects.

165. Ultra vires contracts. A contract made *ultra vires* is void; but not on the ground of illegality. Lord Cairns in the case last above cited takes exception to the use of the term "illegality," pointing out that it is not the *object* of the contracting parties, but the *incapacity* of one of them, that avoids the contract.¹

4. Lunatics and drunken persons

166. Lunatics' contracts. The contract of a lunatic is binding upon him unless it can be shown that at the time of making the contract he was wholly incapable of understanding what he was doing and that the other party knew of his condition.

"When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."^b

A lunatic, even though he has been found insane by inquisition,^c is not on that account incapable of contracting: the valid-

^a 8 Edw. VII, c. 69.

^b Imperial Loan Co. v. Stone, [1892] 1 Q.B. 601.

^c Commissions de lunatico inquirendo are no longer issued specially in each case of alleged insanity. A general commission is now, by 53 & 54 Vict. c. 5, issued from time to time, under the Great Seal, to Masters in Lunacy appointed by that Act, who conduct an inquiry in each case in a manner prescribed by the Act.

without any affirmative expression to that effect in their charters or governing statutes, and of course in the absence of express prohibitions, the same power to make contracts, within the scope of the purposes of their creation, which natural persons have; (2) That this power, on the other hand, is restricted to the purposes for which the corporation has been created, and cannot be lawfully exercised by it for other purposes." ⁴ Thompson on Corp., § 5645, and cases there cited. See also *Thomas v. Railroad Co.*, (1879) 101 U.S. 71.

¹ In the United States if either party has had the benefits of a contract *ultra vires*, an action will lie in favor of the other party. The better view is that this liability is quasi-contractual, and that the suit is for benefits conferred, and not on the original contract. *Central Trans. Co. v. Pullman Car Co.*, (1890) 139 U.S. 24; (1897) 171 U.S. 138; *Bath Gas Light Co. v. Claffy*, (1896) 151 N.Y. 24; *Brunswick Gas Light Co. v. United Gas Fuel & Light Co.*, (1893) 85 Me. 532; *Slater Woollen Co. v. Lamb*, (1887) 143 Mass. 420. Some courts put the decision on the ground of equitable estoppel. *Denver Fire Ins. Co. v. McClelland*, (1885) 9 Colo. 11. But if nothing has been received by the corporation it may set up that the contract is *ultra vires*. *Jemison v. Bank*, (1890) 122 N.Y. 135; *Davis v. Railroad Co.*, (1881) 131 Mass. 258.

ity of the contract depends on the knowledge which the other party may be shown, or reasonably supposed, to have possessed of the state of mind of the insane person.^{a 1} But it seems that a lunatic so found by inquisition cannot, even during a lucid interval, execute a valid deed which disposes of property.^b

167. Intoxicated persons' contracts. A person who makes a contract while in a state of intoxication may subsequently avoid the contract, but if it is confirmed by him it is binding on him. A man, while drunk, agreed at an auction to make a purchase of houses and land. Afterwards, when sober, he affirmed the contract, and then repented of his bargain, and when sued on the contract pleaded that he was drunk at the time he made it. But the court held that although he had once had an option in the matter and might have avoided the contract, he was now bound by his affirmation of it. "I think," said Martin, B., "that a drunken man, when he recovers his senses, might insist on the fulfillment of his bargain, and therefore that he can ratify it so as to bind himself to a performance of it."^{c 2}

^a Hall v. Warren, (1804) 9 Ves. 605.

^b Re Walker, [1905] 1 Ch. 150.

^c Matthews v. Baxter, (1873) L.R. 8 Ex. 132.

¹ The American cases are in great confusion. The following propositions may be regarded as fairly sustained by the weight of authority: (1) Where the sane person does not know of the other person's insanity, and there has been no judicial determination of such insanity, and the contract is so far executed that the parties cannot be put *in statu quo*, the contract is binding upon the lunatic. Gribben v. Maxwell, (1885) 34 Kans. 8; Young v. Stevens, (1868) 48 N.H. 133; Brodrib v. Brodrib, (1880) 56 Cal. 563; Copenrath v. Kienby, (1882) 83 Ind. 18; Bokemper v. Hazen, (1895) 96 Iowa, 221; Schaps v. Lehner, (1893) 54 Minn. 208; Hosler v. Beard, (1896) 54 Ohio St. 398; Insurance Co. v. Hunt, (1880) 79 N.Y. 541. (2) The contract is voidable if the sane person knew of the other's insanity; Crawford v. Scovell, (1880) 94 Pa. 48; or void if the insanity has been judicially declared; Wadsworth v. Sharpsteen, (1853) 8 N.Y. 388; Carter v. Beckwith, (1891) 128 N.Y. 312. (3) Some courts hold a lunatic's deed absolutely void. Wilkinson v. Wilkinson, (1900) 129 Ala. 279; Brigham v. Fayerweather, (1887) 144 Mass. 48. But the weight of authority is otherwise. Blinn v. Schwarz, (1904) 177 N.Y. 252; Luhrs v. Hancock, (1901) 181 U.S. 567; Boyer v. Berryman, (1889) 123 Ind. 451; Harrison v. Otley, (1897) 101 Iowa, 652. Gribben v. Maxwell, *supra*. So also a lunatic's power of attorney has been held to be void. Dexter v. Hall, (1872, U.S.) 15 Wall. 9; but see Williams v. Sapieha, (1901) 94 Tex. 430. If the lunatic becomes sane, he may ratify or disaffirm all voidable contracts; Arnold v. Richmond Iron Works, (1854, Mass.) 1 Gray, 434; but he may be required to return the consideration. Boyer v. Berryman, (1889) 123 Ind. 451; McKenzie v. Donnell, (1899) 151 Mo. 431. The sane person cannot avoid the contract. Atwell v. Jenkins, (1895) 163 Mass. 362. ² Barrett v. Buxton, (1826, Vt.) 2 Aik. 167; Reinskopf v. Rogge, (1871) 37 Ind. 207; Joest v. Williams, (1873) 42 Ind. 565; Chicago &c. Ry. v. Lewis, (1884) 109 Ill. 120; Van Wyck v. Brasher, (1880) 81 N.Y. 260; Bush v. Breinig, (1886) 113 Pa. 310; Carpenter v. Rodgers, (1886) 61 Mich. 384; Bursinger v. Bank, (1886) 67 Wis. 75.

168. **Equity rules.** The rules of equity are in accordance with those of common law in this respect. Under such circumstances as we have described, courts of equity will decree specific performance against a lunatic or a person who entered into a contract when intoxicated, and will on similar grounds refuse to set aside their contracts.

169. **Necessaries.** By the Sale of Goods Act, 1893,^a a lunatic or a drunkard is liable *quasi ex contractu* for necessaries sold and delivered, if by reason of mental incapacity or drunkenness he is incapable of contracting.^{b 1}

5. Married women

170. **Contracts void at common law.** Until the 1st of January, 1883, it was true to state that, as a general rule, the contract of a married woman was void.²

171. **Exceptions.** Yet there were exceptions to this rule: in some cases a married woman could make a valid contract, but could not sue or be sued apart from her husband; in others she could sue but could not be sued alone; in others she could both sue and be sued alone.

(1) A married woman might acquire contractual rights by reason of personal services rendered by her, or of the assignment to her of a *chose in action*. In such cases the husband might "reduce into possession" rights of this nature accruing to his wife, but unless he did this by some act indicating an intention to deal with them as his, they did not pass, like other personalty of the wife, into the estate of the husband. They survived to the wife if she outlived her husband, or passed to her representatives if she died in his lifetime.^{c 3}

(2) The wife of the king of England "is of capacity to grant

^a 56 & 57 Vict. c. 71, § 2.

^b *Re J.*, (1909) 21 Cox, 766.

^c *Brashford v. Buckingham and wife*, (1908) Cro. Jac. 77; *Dalton v. Mid. Coun. R. Co.*, (1853) 13 C.B. 478.

¹ *Soeva v. True*, (1873) 53 N.H. 627; *McCormick v. Littler*, (1877) 85 Ill. 62; *Kendall v. May*, (1865, Mass.) 10 Allen, 59; *Sawyer v. Lufkin*, (1868) 56 Mo. 308; *Hoeler v. Beard*, (1896) 54 Ohio St. 398; *Carter v. Beckwith*, (1891) 128 N.Y. 312.

² Subject to some of the exceptions indicated below, all contracts of married women in this country are absolutely void in the absence of statutory modifications. *Flesh v. Lindsay*, (1892) 115 Mo. 1; *Bank v. Partee*, (1878) 99 U.S. 325; *Fuller v. Bartlett*, (1856) 41 Me. 241; *Parker v. Lambert*, (1857) 31 Ala. 89; 2 L.R.A. 345, note. See for statutory changes, § 175, post.

³ *Miller v. Miller*, (1829, Ky.) 1 J.J. Marsh. 169; *Hayward v. Hayward*, (1838, Mass.) 20 Pick. 517; *Borst v. Spelman*, (1850) 4 N.Y. 284; *Stande- ford v. Devo*, (1863) 21 Ind. 404.

and to take, sue and be sued as a *feme sole*, at the common law."^a

(3) The wife of a man *civiliter mortuus*^{b 1} had similar rights.

(4) The custom of the City of London enabled a married woman to trade, and for that purpose to make valid contracts. She could not sue or be sued upon these (except in the city courts) unless her husband was joined with her as a party, but she did not thereby involve him in her trading liabilities.²

(5) A group of exceptions to the general rule was created by the Divorce and Matrimonial Causes Act.^{c 3}

A woman divorced from her husband is restored to the position of a *feme sole*.

Judicial separation, while it lasts, causes the wife "to be considered as a *feme sole* for the purpose of contract, and wrongs and injuries, and suing and being sued in any judicial proceeding."⁴ §§ 25, 26.

And a wife deserted by her husband, and having obtained a protection order from a magistrate or from the court, is "in the like position with regard to property and contracts, and suing and being sued, as she would be under this act if she had obtained a judicial separation." § 21.

(6) Akin to the last exception, though not resting upon statute, is the capacity of a married woman to make a contract with her husband that they should live apart, and to compromise proceedings commenced or threatened in the Divorce Court. For all contracts incident to such a transaction the wife is placed in the position of a *feme sole*.^{d 5}

172. *Separate estate in equity.* The *separate estate* of a married woman has in various degrees, in equity and by statute, been treated as a property in respect of which and to the extent of which she can make contracts.

^a Co. Litt. 133a.

^b Civil death arises from outlawry; it seems doubtful whether there are any other circumstances to which the phrase is now applicable.

^c (1857) 20 & 21 Vict. c. 85.

^d *McGregor v. McGregor*, (1888) 21 Q.B.D. 494.

¹ See § 155, *ante*; Metcalf on Cont., pp. 83, 84; Stimson, Am. St. Law, §§ 2513, 6353.

² This custom was not adopted in the United States outside of South Carolina. See *Netterville v. Barber*, (1876) 52 Miss. 168. For statutes regulating trading contracts, see Stimson, Am. St. Law, §§ 6520-23.

³ See Stimson, Am. St. Law, §§ 6240-54, 6306-09, 6352-59.

⁴ *Dean v. Richmond*, (1827, Mass.) 5 Pick. 461; *Barker v. Mann*, (1842, Mass.) 4 Met. 302.

⁵ *Dutton v. Dutton*, (1868) 30 Ind. 452; *Thomas v. Brown*, (1859) 10 Ohio St. 247; *King v. Molohan*, (1900) 61 Kans. 683; *Hungerford v. Hungerford*, (1900) 161 N.Y. 550; 60 L.R.A. 406, note

The doctrine arose in the chancery. Property, real and personal, might be held in trust for the separate use of a married woman independent of her husband. Sometimes this property was settled on her with a "restraint upon anticipation": in such a case she could use the income, but could neither touch the *corpus* of the property, nor create future rights over the income. But where it was not so restrained, then to the extent of the rights and interests created, a married woman was treated by courts of equity as having power to alienate and contract.^{a 1}

But she could not sue or be sued alone in respect of such estate, nor could she bind by contract any but the estate of which she was in actual possession or control at the time the liabilities accrued.^b

173. *Separate estate by statute.* The Married Women's Property Acts of 1870 and 1874^c specified various forms of property as the separate estate of married women, enabled them to sue for such property and gave them all remedies, civil and criminal, for its protection that an unmarried woman would have had under the circumstances. Under this act a married woman might make a contract for the exercise of her personal skill or labor, and maintain an action upon it in her own name.

Thus was constituted a new legal separate estate, not vested in trustees, and in respect of which a married woman could sue apart from her husband. But this estate was limited in character, and the married woman could not defend alone any action brought concerning it: it was necessary that her husband should be joined as a party.^{d 2}

^a *Johnson v. Gallagher*, (1861) 3 D.F. & J. 494.

^b *Pike v. FitzGibbon*, (1881) 17 Ch. D. 454.

^c 33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50.

^d *Hancocks v. Leblache*, (1878) 3 C.P.D. 197.

¹ *Nix v. Bradley*, (1853, S.C.) 6 Rich. Eq. 43; *Jaques v. Methodist Church*, (1820, N.Y.) 17 Johns. 548; *Kantrowitz v. Prather*, (1869) 31 Ind. 92.

² Married Women's Property Acts, securing to a wife her separate estate, are found in practically all the American states. The earliest is believed to be that of Mississippi in 1839; but the most effective and most widely copied was that of New York passed in 1848 (now found as amended in N.Y. Domestic Relations Law, § 20 *et seq.*). In many states conveyances directly from wife to husband or husband to wife are authorized. (*Ibid.* § 26.) See *Wells v. Caywood*, (1877) 3 Colo. 487. These statutes also authorize contracts by the wife concerning her separate estate.

Under the New York Married Women's Property Acts the conclusion was reached by successive decisions that a married woman's contracts could be enforced against her separate estate in three cases: (1) when created in or about carrying on a trade or business of the wife; (2) when relating to or made for the benefit of her separate estate; (3) when the intention to

174. Present English statutory law.

The Married Women's Property Act of 1882^a repeals the Acts of 1870 and 1874, except as regards all rights acquired or acts done while those statutes were in force. It affects:

- (1) Every woman married after January 1st, 1883.
- (2) Every woman married before January 1st, 1883, as respects property and *choses in action* acquired after that date.

We may summarize its effect, so far as it relates to our present purpose, as follows:

All property, real and personal, in possession, reversion or remainder, vested or contingent, held by a woman before, or acquired after marriage, is now her separate property. She can acquire, hold, and dispose of it by will or otherwise, "as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee."

"In respect of and to the extent of her separate property" a married woman may enter into contracts, and render herself liable thereupon, as though she were a *feme sole*, and on such contracts she may sue and be sued alone.

By the Married Women's Property Act, 1893,^b every contract now made by a married woman otherwise than as agent, binds her separate estate, and binds separate estate acquired after the contract was made though she possessed none at the time of making the contract.

The last enactment extends in two ways the operation of the Act of 1882. (1) Under that act the court might draw inferences as to the intention of a married woman to bind or not to bind her separate estate.^c Since 1893 the existence of an intention to bind such estate is presumed and cannot be negatived. (2) The Act of 1882 has been interpreted to mean that the power of a married woman to bind her separate estate depended on the existence of such estate at the date of the contract.^d The amending act, as regards all contracts made after December 5, 1893, binds separate estate when acquired, whether or no the married woman possessed any at the date of the contract. But these contracts must have been made since the passing of the Act: an acknowledgment of a pre-existing debt on which a married woman could not have been sued before the act is not a contract within the meaning of the Act.^e

The effect of the words "otherwise than as agent" was considered in the case of *Paquin v. Beauclerk*,^f where it was held that a married woman who has in fact authority from her husband to deal with tradesmen as his agent, does not bind her separate estate, present or after-acquired, even though the fact of her agency is wholly unknown to the tradesman with whom she deals.

^a 45 & 46 Vict. c. 75.

^c *Leak v. Driffeld*, (1889) 24 Q.B.D. 98.

^e *In re Wheeler*, [1904] 2 Ch. 70.

^b 56 & 57 Vict. c. 63.

^d *Palliser v. Gurney*, (1887) 19 Q.B.D. 519.

^f [1906] A.C. 148.

charge the separate estate was expressed in the instrument or contract by which the liability was created. *Manhattan Brass & Co. v. Thompson*, (1874) 58 N.Y. 80. If she had no separate estate or was not carrying on a separate business, she could not contract. *Linderman v. Farquharson*, (1886) 101 N.Y. 434. But later legislation has empowered her to contract for all purposes as fully as an unmarried woman; see § 175, *post*.

The extended liability imposed by the Act of 1893 does not affect separate estate which a married woman is restrained from anticipating. Where property is settled upon a married woman in trust, and subject to a restraint on anticipation, such property is not then free, and she cannot make it liable, in advance, for the satisfaction of her contracts.

Thus, if a judgment is recovered against a married woman who has separate estate which is not free, such a judgment can only affect so much of the estate as is actually in her hands at the time, or income from it which is due and in arrear at the date of the judgment. It cannot affect income from such property accruing and coming into her hands after the date of the judgment.^a

The restraint cannot be removed by a statement made in good faith, or otherwise, that it is withdrawn. And the words in the Act of 1893 which protect such property "at the time of making the contract or thereafter" extend the protection after coverture has ceased.^b

But an unmarried woman possessed of property and debts, cannot upon marriage evade her debts by settling her property upon herself without power of anticipation. Property owned *before* marriage is liable to debts contracted *before* marriage, however the property may be settled *upon* marriage.^c

On the same principle, where debts are incurred by a married woman on the faith of her *free* separate estate, they bind her estate when coverture has ceased by reason of widowhood or dissolution of marriage.

But the liability to which a married woman can thus subject herself is not a personal liability. It cannot come into existence unless there is separate estate, and it does not extend beyond the separate estate.

Thus where a joint judgment is given against husband and wife, it is to be given against the husband personally, and against the wife as to her separate property. And again, a married woman cannot (unless carrying on a trade or business)^d be made a bankrupt or committed to prison under § 5 of the Debtors' Act, 1869,^e for non-payment of a sum for which judgment has been given against her, under § 1, sub-a. 2 of the Act of 1882. The Debtors' Act relates to persons from whom a debt is due, and damages or costs recovered against a married woman do not constitute a debt due from her, but "shall be payable out of her separate estate, and not otherwise."^f

Beyond this a judgment against a married woman is precisely the same as a judgment against an unmarried woman."^g The judgment is against *her*: "the fact that execution is limited to her separate property does not make it any the less a judgment against her."^h

Thus the Acts of 1882 and 1893 increase in two ways the power of contracting possessed by a married woman.

Marriage no longer involves any proprietary disability. All the prop-

^a Hood-Barrs v. Heriot, [1896] A.C. 174; Bolitho v. Gidley, [1905] A.C. 98.

^b Bateman v. Faber, [1896] 1 Ch. (C.A.) 144; Brown v. Dimbleby, [1904] 1 K.B. 28.

^c Jay v. Robinson, (1890) 25 Q.B.D. 467.

^d A married woman carrying on a trade or business, whether separately from her husband or not, is now expressly made subject to the bankruptcy laws as if she were a *feme sole*, by § 125 of the Bankruptcy Act, 1914 (4 & 5 Geo. V, c. 50).

^e 32 & 33 Vict. c. 62.

^f Scott v. Morley, (1887) 20 Q.B.D. 120.

^g Holtby v. Hodgson, (1880) 24 Q.B.D. 109.

^h Pelton v. Harrison, [1892] 1 Q.B. 121.

erty which a woman owns when she marries remains hers, and all property which she may subsequently acquire becomes hers, unless it is placed in the hands of trustees with a restraint upon anticipation. The area of separate estate is immensely extended, and therewith the contractual capacity of the woman. Full effect is given to this extension by the provision in the act that future as well as existing separate estate is rendered liable to satisfy the contract.

And the rights and liabilities thus increased are rendered more easy of enforcement by the provision which enables the married woman to sue and be sued alone.

[AMERICAN NOTE]

175. Married women's contracts under American statutes.

In the following states a married woman may contract as if unmarried, subject to specified exceptions in some of the states (for example, she may not become a surety for her husband in some states or at all in others, in several she may not sell or mortgage her real property without her husband's consent, in a few she may not contract with her husband). Ala. Code, (1907) c. 95; Ariz. R.S., (1913) § 3852; Ark. St., (Kirby, 1904) c. 108; Cal. Civ. Code, (1909) §§ 158, 1556; Colo. Annot. St., (Mills, 1912) § 4759; Conn. Gen. St., (1902) § 4545; Ga. Code, (1911) §§ 3007, 3011; Ill. R.S., (1911) p. 1284, § 6; Ind. R.S., (Burns, 1914) c. 86; Iowa Code, (1897) § 3164; Ky. St., (1915) § 2128; Me. Rev. St., (1903) ch. 63, § 4, and see 96 Me. 533; Md. Ann. Code, (1911) Art. 45, § 5; Mass. Rev. Laws, (1902) c. 153, § 2; Mich. Pub. Acts, (1917) p. 287; Minn. Rev. Laws, (1909) § 3607; Miss. Annot. Code, (1917) § 2051; Mo. R.S., (1909) § 8304; Mont. Civil Code, (1907) § 3736; New Hamp. Pub. St., (1901) c. 176, § 2; N.J. Comp. St., (1911) p. 3226, § 5; N.Y. Cons. Laws, (1909), Dom. Rel. L. § 51; N.Dak. Rev. Codes, (1913) § 4411; Ohio Gen. Code, (1910) § 7999; Ore. Laws, (Lord, 1910) § 7049; R.I. Gen. Laws, (1909) c. 246; S.Car. Civ. Code, (1912) § 3761; S.Dak. Comp. Laws, (1908) Civ. Code, §§ 98, 105; Utah Comp. Laws, (1907) § 1199; Vt. Gen. Laws, (1917) § 3521; Va. Code, (1904) § 2286a; Wash. Annot. Codes & St., (Rem. & Bal., 1910) § 5927; Wyo. Comp. St., (1910) § 3909.

In Florida a married woman may obtain a decree in chancery to remove her disabilities. R.S. (1906) §§ 1955-1958 (and see 19 Fla. 175). In Louisiana her legal incapacity may be removed either by her husband or by a court. Civil Code, § 1786.

In the following states a married woman may contract with respect to property as if single, and these statutes have been so construed as to remove most common-law disabilities except as expressly retained. Idaho Rev. Codes, (1908) §§ 2677, 2685; Nev. Comp. Laws, (1912) § 2173; New Mex. St., (1915) § 2750; Okla. R.L. (1910) § 3353; Penn. Pepper & Lewis Dig., pp. 2887-2890, §§ 1, 2, or L. 1893, No. 284, Purdon's Dig., (1903) p. 2451, L. 1915, No. 279.

In the following states a married woman may contract as to her separate estate or in a trade or business. Kans. Gen. St., (1901) c. 62; Neb. Comp. St., (1905) §§ 4291, 4293; Tenn. Code, (Shannon's Supp., 1903)

§ 4241, and L. 1897, c. 82; W.Va. Code, (1906) c. 66, §§ 12, 13; Wis. St., (1911) c. 108. In North Carolina she may do so with the consent of her husband. Rev. of 1905, §§ 2094, 2112, 2113.

In the following states a married woman may contract as to her separate estate. Del. Rev. Code (1893) c. 550, § 4; Tex. Rev. Civ. St., (1911) Tit. 68, c. 3.

For cases on the conflict of laws arising under such statutes, see 57 L.R.A. 513, note, and 85 Am. St. Rep. 552, note.

CHAPTER VI

Mistake, Misrepresentation, Fraud, and Duress

176. Collateral operative facts affecting contract. The next feature in the formation of contract which has to be considered is genuineness or reality of consent;¹ and here the same question recurs in various forms: Given an apparent agreement, possessing the element of form or consideration, and made between parties capable of contracting, was the consent of both or either given under such circumstances as to make it no real expression of intention?

This question may have to be answered in the affirmative for any one of the following reasons.

(i) The parties may not have meant the same thing; or one or both may, while meaning the same thing, have formed untrue conclusions as to the subject-matter of the agreement. This is mistake.

(ii) One of the parties may have been led to form untrue conclusions respecting the subject-matter of the contract by statements innocently made, or facts innocently withheld by the other. This is innocent misrepresentation.

(iii) These untrue conclusions may have been induced by representations of the other party made with a knowledge of their untruth and with the intention of deceiving. This is wilful misrepresentation or fraud.

(iv) The consent of one of the parties may have been extorted from him by the other by actual or threatened personal violence. This is duress.

(v) Circumstances may render one of the parties morally incapable of resisting the will of the other, so that his consent is no real expression of intention. This is undue influence.

¹ The consent is none the less "genuine" and "real," even though it be induced by fraud, mistake, or duress. Consent may be induced by a mistaken hope of gain or a mistaken estimate of value or by the lie of a third person, and yet there is a contract and we do not doubt the "reality of the consent." Fraud, mistake, and duress are merely collateral operative facts that co-exist with the expressions of consent and have a very important effect upon the resulting legal relations.

I. MISTAKE

177. **Cases excluded from mistake.** The confusion which attends all discussions on mistake makes it important to strike off at once all topics which, though superficially connected with the subject, are not relevant to mistake as invalidating a contract.

1. *Mistake of expression.* First, then, we must strike off cases where the parties are genuinely agreed, though the terms employed in making their agreement do not convey their true meaning. In such cases they are permitted to explain, or the courts are willing to correct their error; but this is mistake of expression, and concerns the interpretation, not the formation of contract.¹

2. *Want of mutuality.* Next, we must strike off all cases in which there was never the outward semblance of agreement because offer and acceptance never agreed in terms.²

3. *False statement, etc.* Thirdly, we must strike off all cases in which the assent of one party has been influenced by a false statement, innocent or fraudulent, made by the other; by violence, or by oppression on the part of the other.³

4. *Failure of consideration.* Lastly, we must strike off all cases in which a man is disappointed in his power to perform his contract, or in the performance of it by the other. This last topic relates to the performance of contract, and would not be mentioned here, but for a practice, common even to learned and acute writers, of confusing mistake and failure of consideration. If a man alleges that a contract to which he was a party has not been performed as he expected, or has altogether failed of performance, the question is not whether he made a contract (for he has clearly done so), but whether the terms of the contract justify his contention. A man who knows with whom he is deal-

¹ Equitable remedies for mistake can better be treated in a work devoted specifically to equity jurisdiction. A similar statement can be made as to quasi-contractual remedies. See Bispham, *Princ. of Eq.* §§ 468-70; 2 Ames' *Cases in Eq. Juris.* p. 178 *et seq.*

² *Rovegno v. Defferari*, (1871) 40 Cal. 459; *Rupley v. Daggett*, (1874) 74 Ill. 351; *Rowland v. New York &c. R.*, (1891) 61 Conn. 103; *Greene v. Bateman*, (1846) 10 Fed. Cas. 1126.

Where one party has so negligently expressed himself as to lead the other reasonably to believe that a certain meaning is intended and the other assents thereto, there is a valid contract. It is immaterial whether the one now asserting the non-existence of a contract does so in good faith or not. See §§ 6, 31, and notes.

³ See *Misrepresentation, Fraud, Duress, Undue Influence, post.*

ing, and the nature of the contract which he wants to make, has only himself to blame if the terms of the contract do not bind the other party to carry out the agreement, or pay damages for default. And though the terms may not express what he intended them to express, his failure to find words appropriate to his meaning is not mistake; if it were so, a contract would be no more than a rough draft of the intention of the parties, to be explained by the light of subsequent events, and corrected by the court and jury.

We must assume that the terms of the contract correspond to the intention of the parties. If performance does not correspond to the terms of the contract, or if the subject-matter of the contract, or the conditions under which it has to be performed, are not such as the parties contemplated, still we cannot say that the rights of the parties are affected by *mistake*. Every honest man, making a contract, expects that he and the other party will be able to perform and will perform his undertaking. The disappointment of such expectations cannot be called *mistake*, otherwise mistake would underlie every breach of contract which the parties had not deliberately intended to break when they made it.¹

178. Cases of operative mistake. The cases in which mistake affects contract are the rare exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed a clear assent, uninfluenced by falsehood, violence, or oppression. If he exhibits all the outward signs of agreement the law will hold that he has agreed.²

It will be found that where mistake is allowed to invalidate a contract, the mistake is sometimes brought about by the act of a third party, sometimes by the dishonesty of one of the parties to the contract, and that the cases of genuine mutual mistake are very few. The circumstances under which mistake is operative would thus arise in one of three ways.

1. *Act of third party.* Two parties are brought into what appear outwardly to be contractual relations by the fraud or negligence of a third, inducing one to enter into a transaction which he did not contemplate, or deal with a party unknown or unacceptable to him.

2. *Dishonesty of one party.* Again, one of two parties allows

¹ See the topics; Conditions, Failure of Consideration, Impossibility, in Chapters XIII, XIV, and XV.

² See §§ 6, 31, and notes.

the other to enter into an agreement with him, knowing that the other is mistaken as to his identity, or knowing that he attaches one meaning to the terms of the agreement while the other party attaches to them another and different meaning.

3. *Mistake of identity or existence of subject.* Or lastly, there are cases of genuine mutual mistake where parties contract for a thing which has ceased to exist, or are in error as to the identity of one another or of the subject of the contract.

These three forms of mistake may be illustrated, though not amply, from the reports. Beyond these the law will not assist people whose judgment leads them astray, unless their judgment was influenced by the fraud or misrepresentation of the other party to the contract. It will be found that the cases which follow fall under one or other of these three heads.

(1) *Mistake as to terms of the contract and as to the fact of agreement*

179. *Act of third party.* It is hard to suppose that this can arise, except from the falsehood or carelessness of a third party. The courts would not permit one who had entered into a contract to avoid its operation on the ground that he did not attend to the terms which were used by himself or the other party, or that he did not read the document containing the contract, or was misinformed as to its contents, or that he supposed it to be a mere form.^a ¹ In like manner one may suppose, though the case has never arisen, that a man who posts a letter of offer or of acceptance, which he had written and addressed, would not be excused from his contract on the ground that he had changed his mind after writing the letter, and had posted it from inadvertence.

The only cases furnished in the reports are cases in which by the fraud of a third party the promisor has been mistaken as to the nature of the contract into which he was entering, and the promisee has in consequence been led to believe in the intention

^a *Hunter v. Walters*, (1871) 7 Ch. 84. (*Howatson v. Webb*, [1907] 1 Ch. 537; [1908] 1 Ch. 1.)

¹ *New York Central R. Co. v. Beaham*, (1916) 37 Sup. Ct. R. 43 (railway ticket plainly setting out terms of contract); *Goldstein v. D'Arcy*, (1909) 201 Mass. 312 (defendant wrote, "All you get above \$2000 per year you may have as your commission." Plaintiff got a tenant for 5 years at \$2200. *Held*, he was entitled to \$1000); *Gibbs v. Wallace*, (1915) 58 Colo. 364; *Frankfort etc., Ins. Co. v. California &c. Co.*, (Cal. App. 1915) 151 Pac. 176. See *ante*, § 31; 3 L.R.A. 308; 8 L.R.A. (N.S.) 1140; 32 L.R.A. (N.S.) 429.

of the other party to contract when he did not so intend. In *Thoroughgood's Case*,* an illiterate man executed a deed, which was described to him as a release of arrears of rent: in fact it was a release of all claims. The deed was not read to him, but when told that it related to arrears of rent, he said, "If it be no otherwise, I am content," and executed the deed. It was held that the deed was void.¹

180. *Foster v. Mackinnon*. In *Foster v. Mackinnon*, Mackinnon, an old man of feeble sight, was induced to indorse a bill of exchange for £3,000, on the assurance that it was a guarantee. Later the bill was indorsed for value to Foster, who sued Mackinnon; the jury found that there was no negligence on the part of Mackinnon, and though Foster was innocent of the fraud, it was held that he could not recover.

"It seems plain on principle and on authority that if a blind man, or a man who cannot read, or who for some reason (*not implying negligence*) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs; then, *at least if there be no negligence*, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that *the mind of the signer did not accompany the signature*; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended." ^b 2

a (1894) 2 Co. Rep. 9.

b *Foster v. Mackinnon*, (1869) L.R. 4 C.P. 711.

¹ *Alexander v. Brogley*, (1899) 63 N.J.L. 307; *Smith v. Smith*, (1892) 134 N.Y. 62; *Wilcox v. Am. Tel. & Tel. Co.*, (1903) 176 N.Y. 115; *O'Donnell v. Clinton*, (1888) 145 Mass. 461; *Adolph v. Minneapolis Ry.*, (1894) 58 Minn. 178; *Gross v. Drager*, (1886) 66 Wis. 150. But see *Chicago & c. Ry. v. Bellwith*, (1897) 83 Fed. 437. In cases of this sort both parties believe there is mutual agreement, and in this both are mistaken. The offeree is mistaken as to the terms of the offer; but as to this the offeror is not mistaken at all. The offeror is mistaken as to the intention of the acceptor. Such a mistake prevents the formation of a contract, in the absence of an estoppel due to negligence. See § 31, *ante*.

² The American cases are generally in accord with this doctrine. *Walker v. Ebert*, (1871) 29 Wis. 194; *Vanbrunt v. Singley*, (1877) 85 Ill. 281; *Mitchell v. Tomlinson*, (1883) 91 Ind. 167; *Green v. Wilkie*, (1896) 98 Iowa, 74 and note; *Aultman v. Olson*, (1886) 34 Minn. 450; *Gibbs v. Linabury*, (1871) 22 Mich. 479. But see *Bank v. Johns*, (1883) 22 W.Va. 520, 535. If, however, the signer was negligent, he is liable to a holder in due course of negotiable paper. *Chapman v. Rose*, (1874) 56 N.Y. 137; *Ort v. Fowler*, (1884) 31 Kans. 478; *Yeagley v. Webb*, (1882) 86 Ind. 424. So he may be estopped as to an innocent purchaser of property who has relied upon documents of title. *Gavagan v. Bryant*, (1876) 83 Ill. 376; *Terry v. Tuttle*, (1872) 24 Mich. 206.

The rule applies to cases where one intends to sign a negotiable instru-

181. *Lewis v. Clay*. *Lewis v. Clay*^a was decided on the same grounds as *Foster v. Mackinnon*. Lewis was the payee of a promissory note made jointly by Clay and Lord William Nevill. Clay had been induced to sign his name on a piece of paper, concealed from him by blotting-paper with the exception of the space for his signature. He was told by Nevill that the document concerned private affairs, and that his signature was wanted as a witness. The jury found that he had signed in misplaced confidence, but without negligence: and Russell, C.J., setting aside any question which might arise from the character of the instrument, or the construction of the Bills of Exchange Act, 1882, held that he was not liable because "his mind never went with the transaction," but was "fraudulently directed into another channel by the statement that he was merely witnessing a deed or other document."

182. *Other illustrations*. The two cases above cited contain certain features in common. In each case two parties had been brought into contractual relations by the fraud of a third person, who had misrepresented the nature of the contract to one of the two parties. In each case the document in question was a negotiable instrument. In each case a jury found that the party deceived had not contributed to his deception by negligence.

The subject has been discussed in the Court of Appeal in the later case of the *Carlisle Banking Co. v. Bragg*.^b The facts differed from those of the previous cases in two particulars. The document signed by Bragg was a guarantee on the faith of which the plaintiffs advanced money: and the jury found that Bragg was negligent in not detecting the fraud which induced his signature.

The court held that negligence would not estop him from denying that his mind went with the signature unless it could be shown that he was under some duty to the other party to the contract.

Negotiable instruments are treated as exceptions to this rule, for the maker, acceptor, or indorser of a negotiable instrument owes a duty to every subsequent *bona fide* holder for value, and

^a (1898) 2 L.J. Q.B. 224; 77 L.T. 658.

^b [1911] 1 K.B. 489.

ment, but not for the amount or in the terms actually written. *Burroughs v. Pac. Guano Co.*, (1886) 81 Ala. 255; *Auten v. Gruner*, (1878) 90 Ill. 300; *Green v. Wilkie*, *supra*; *Aultman v. Olson*, *supra*; But negligence might be more easily inferred in such a case. *Yeagley v. Webb*, *supra*; *Fayette Co. Bank v. Steffes*, (1880) 54 Iowa, 214.

is liable on the instrument unless he can show not merely that his mind did not go with his signature but that no negligence on his part contributed to his mistake.¹ It might be thought reasonable that, if one of two innocent parties is to suffer for the fraud of a third, the sufferer should be the one whose negligence has contributed to the loss sustained. This however seems not to be the view of the Court of Appeal.^a

The same question may arise where the act of the third party is merely officious or careless. It has been held that a man is not bound by an offer wrongly transmitted by a telegraph clerk and accepted by the offeree. The post-office had no authority to convey the message except in the form presented to it.^{b 2}

183. Summary of doctrine. Mistake therefore as to the nature

^a The decision in *Carlisle Banking Co. v. Bragg*, [1911] 1 K.B. 480, which cannot be regarded as satisfactory, is discussed in an article in 28 L.Q.R. 190.*

^b *Hosbell v. Pape*, (1870) L.R. 6 Ex. 7.

* This decision thoroughly deserves the drastic criticism given it by Sir William Anson in 28 *Law Quarterly Review*, 190.

¹ There is no reason for treating these as exceptions. A party to a negotiable instrument owes no *contractual duty* to a subsequent *bona fide* holder before he becomes such, and if, in the absence of such a duty, mistake prevents the existence of a contract, it would so operate here. See *Page v. Krekey*, (1893) 137 N.Y. 307. In fact there is a legal duty in all cases, whether of negotiable instruments or of other contracts and conveyances, the duty of not causing damage by negligence. The principles of estoppel apply with special force in the case of negotiable paper, but not in such case exclusively. See *ante*, § 180, and note. Where A completes and signs a negotiable instrument, but without intending to deliver it, and it is taken from his possession and put into circulation, it has been held that he is liable upon it to a *bona fide* holder for value. *Worcester County Bank v. Dorchester &c. Bank*, (1852, Mass.) 10 Cush. 488; *Shipley v. Carroll*, (1867) 45 Ill. 285; *Gould v. Segee*, (1856, N.Y.) 5 Duer, 280; *Kinyon v. Wohlford*, (1871) 17 Minn. 239; *Neg. Inst. Law*, § 16 (N.Y. § 35). *Contra*: *Burson v. Huntington*, (1870) 21 Mich. 415; *Salley v. Terrill*, (1901) 95 Me. 553; *Salander v. Lockwood*, (1879) 66 Ind. 285 (*semble*). But not if the instrument is incomplete. *Neg. Inst. Law*, § 15 (N.Y. § 34).

² On this point the American cases are in conflict. In accord with the rule laid down above are: *Pepper v. Tel. Co.*, (1889) 87 Tenn. 554; *Shingleur v. W.U. Tel. Co.*, (1896) 72 Miss. 1030; *Strong v. W.U. Tel. Co.*, (1910) 18 Idaho, 389, 30 L.R.A. (N.S.) 409, Ann. Cas. 1912 A, 55. The German Civil Code, §§ 120, 122, follows this rule, but requires an indemnity, perhaps somewhat in the nature of a division of the loss. In conflict with the English rule are: *Ayer v. W.U. Tel. Co.*, (1887) 79 Me. 493; *W.U. Tel. Co. v. Shotter*, (1883) 71 Ga. 760; *Haubelt v. Rea, etc. Co.*, (1898) 77 Mo. App. 672; *Sherrard v. W.U. Tel. Co.*, (1911) 146 Wis. 197; *Durkee v. Vt. Cent. R. Co.*, (1856) 29 Vt. 127. See also *Penobscot Fish Co. v. W.U. Tel. Co.*, (Conn. 1916) 98 Atl. 341; *Postal T. & C. Co. v. Wells*, (1903) 82 Miss. 733. If the offeree knew or ought to have known that there was an error, there is no contract. *Germain Fruit Co. v. W.U. Tel. Co.*, (1902) 137 Cal. 598; cf. *J. L. Price Brokerage Co. v. Chicago, B. & Q. R.R. Co.*, (1917, Mo. App.) 199 S.W. 732, and comment in 27 *Yale Law Journal*, 932.

of the transaction entered into, or as to the intention of the other party to make a contract, must be mutual mistake; the mistake must arise from deceit or mischance which is the work of a third party, but, save in the case of negotiable instruments, the question of negligence is immaterial, unless a duty to the other party to the contract can be established; if these conditions are not fulfilled, the contract, if affected at all, will be voidable for fraud or misrepresentation and will not be void on the ground of mistake at all.

(2) *Mistake as to the identity of the person with whom the contract is made*

184. Mistake as to party. Mistake of this sort can only arise where *A* contracts with *X*, believing him to be *M*: that is, where the offeror has in contemplation a definite person with whom he intends to contract. It cannot arise in the case of general offers which any one may accept, such as offers by advertisement, or sales for ready money. In such cases the personality of the acceptor is plainly a matter of indifference to the offeror.^a

In *Boulton v. Jones*,^b Boulton had taken over the business of one Brocklehurst, with whom Jones had been used to deal, and against whom he had a set-off. Jones sent an order for goods to Brocklehurst, which Boulton supplied without any notice that the business had changed hands. When Jones learned that the goods had not come from Brocklehurst he refused to pay for them, and it was held that he need not pay. "In order to entitle the plaintiff to recover, he must show that there was a contract with himself."¹

^a Where the personality of one party may be important to the other the assumption of a false name is fraudulent and makes the contract voidable. In *Gordon v. Street*, [1899] 2 Q.B. 641, the defendant was induced to borrow money from Gordon, a money-lender, whose usurious practices were notorious, who on this occasion contracted under the name of Addison. On discovery of the fraud Street was held to be entitled to repudiate the contract.

^b (1857) 2 H. & N. 564.

¹ *Accord*: *Boston Ice Co. v. Potter*, (1877) 123 Mass. 28, with which compare *Stoddard v. Ham*, (1880) 129 Mass. 383. It would seem that if the goods have been consumed in ignorance of the mistake, the consumer is liable to no one. But if he deals with them after notice of the mistake, he becomes liable either in trover after demand or in *assumpsit* upon an implied "ratification" of the substitution of parties. *Randolph Iron Co. v. Elliott*, (1870) 34 N.J. L. 184; *Barnes v. Shoemaker*, (1887) 112 Ind. 512.

These cases should be carefully distinguished from those where *B* deals with *A*, supposing *A* to be acting for himself, when in fact *A* is acting for an undisclosed principal, *X*. In such case, subject to certain qualifications, *X* may sue or be sued upon the contract. *Hubbard v. Tenbrook*, (1889) 124 Pa. 291; *Huntington v. Knox*, (1851, Mass.) 7 Cush. 371; *Huffcut on Agency*, Ch. X.

In *Cundy v. Lindsay*,^a a person named Blenkarn, by imitating the signature of a respectable firm named Blenkiron, induced A to supply him with goods which he afterwards sold to X. It was held that an innocent purchaser could acquire no right to the goods, because as between A and Blenkarn there was no contract.

"Of him," says Lord Cairns, "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind, which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where in order to produce a contract, two sides would be required."¹

The result of the two cases is no more than this, — that if a man accepts an offer which is plainly meant for another, or if he becomes party to a contract by falsely representing himself to be another,^b the contract in either case is void,^c or, to put it more accurately, no contract ever comes into existence.² In the first case one party takes advantage of the mistake, in the other he creates it.

185. Cases of mutual error. The reports furnish us with no case of genuine mistake, in which A makes an offer to M believing him to be X, and M accepts, believing the offer to be meant for him.

^a (1878) 3 App. Cas. 459.

^b There is a mass of authority to the effect that where a man induces another to contract with him or to supply him with goods by falsely representing himself to be some one else than he is, or to have an authority which he does not possess, no contract is made, and no property in the goods passes. *Hardman v. Booth*, (1863) 1 H. & C. 803; *Kingsford v. Merry*, (1856) 1 H. & N. 503; and *Hollins v. Fowler*, (1875) L.R. 7 H.L. 757, where all or nearly all the cases bearing on the subject are reviewed.

^c *Baillie's Case*, [1898] 1 Ch. 110.

¹ *Phelps v. McQuade*, (1913) 158 N.Y. App. Div. 528. See 14 *Columbia Law Review*, 85. The same result follows if the seller is induced to contract with B on his false representation that he is acting as agent for a named person. *Barker v. Dinsmore*, (1872) 72 Pa. 427; *Rodliff v. Dallinger*, (1886) 141 Mass. 1; *Alexander v. Swackhamer*, (1885) 105 Ind. 81; *Hents v. Miller*, (1883) 94 N.Y. 64.

² A distinction has been drawn where the defrauder deals in person with the party he is defrauding, but assumes the name and credit of a third person. It is held that in such a case the defrauder gets the legal power to create a perfect legal and equitable title in an innocent purchaser of the goods obtained by the fraud. The reason given is that the defrauder is personally present and that the defrauded party intends to deal with him. *Martin v. Green*, (1918, Me.) 102 Atl. 977; *Edmunds v. Merchants, etc. Co.*, (1883) 135 Mass. 283; *Samuel v. Cheney*, (1883) 135 Mass. 278; but see *contra*, *Pacific Express Co. v. Shearer*, (1896) 160 Ill. 215.

If in *Boulton v. Jones*^a the plaintiff had succeeded a predecessor in business of the same name, he might reasonably have supposed that the order for goods was meant for him. If the order had been given to Boulton A, and accepted by Boulton X, it is very doubtful whether Jones could have avoided the contract on the ground that though he obtained the goods he wanted from the man to whom his order was addressed, the Boulton whom he had addressed was not the Boulton whom he intended to address.¹

Circumstances might indicate to the offeree that the offer was intended for a different person. An offer of marriage falling into the hands of a lady for whom it was not intended, where two ladies chanced to have the same name and address, might or might not be turned into a promise by acceptance, according as the terms of acquaintance, or age of the parties might justify the recipient in supposing that the offer was meant for her. An offer for the purchase of goods might not call for the same nicety of consideration on the part of the offeree.

(3) *Mistake as to the subject-matter*

(a) *Mistake of identity as to the thing contracted for*

186. Mistake of identity. A contract may be void on the ground of mistake, if two things have the same name, and A makes an offer to X referring to one of them, which offer X accepts, thinking that A is referring to the other. If there is nothing in the terms of the contract to identify one or other as its subject-matter, evidence may be given to show that the mind of each party was directed to a different object: that A offered one thing, and X accepted another.

In *Raffles v. Wichelhaus*^b the defendant agreed to buy of the plaintiff a cargo of cotton "to arrive *ex Peerless* from Bombay." There were two ships called *Peerless*, and both sailed from Bombay, but Wichelhaus meant a *Peerless* which arrived in October, and Raffles meant a *Peerless* which arrived in December. It was held that there was no contract.² But if Wichelhaus had meant

^a (1857) 2 H. & N. 564.

^b (1864) 2 H. & C. 906.

¹ If the acceptor knows the offer was intended for his predecessor, there is no contract. *Jordan, Marsh & Co. v. Beals*, (1909) 201 Mass. 163.

² In this case there was no actual agreement, although there appeared to be one. Further, there was no negligence or other ground for holding that there was a contract by estoppel. See *ante*, § 31; also *Kyle v. Kavanagh*, (1869) 103 Mass. 356; *Stong v. Lane*, (1896) 66 Minn. 94; *Sheldon v. Capron*, (1855) 3 R.I. 171; *Irwin v. Wilson*, (1887) 45 Ohio St. 426; *Mead v. Ins. Co.*, (1893) 158 Mass. 124.

a ship of a different name, he would have had to take the consequences of his carelessness in not expressing his meaning properly. Nor could he have avoided the contract if its terms had contained such a description of the subject-matter as would practically identify it.^a

(b) *Mistake as to the existence of the thing contracted for*

187. Subject-matter non-existent. It has been doubted whether this can be regarded as mistake, or whether the parties to every contract do not act on an assumption, or implied condition vital to the contract, that the subject-matter of the contract is in existence.^b The language of the courts is, however, in favor of treating these cases as cases of mistake.

In *Couturier v. Hastie*,^c a contract was made for the sale of a cargo of corn, which the parties supposed to be on its voyage from Salonica to England: it had in fact, before the date of sale, become so heated that it was unloaded at Tunis and sold for what it would fetch. The court held that the contract was void, inasmuch as "it plainly imports that there was something to be sold, and something to be purchased, whereas the object of the sale had ceased to exist."¹

In *Scott v. Coulson*,^d a contract for the assignment of a policy of life insurance was made upon the basis of a belief common to both parties that the assured was alive. He had, in fact, died before the contract was made. It was held that "there was a common mistake, and therefore the contract was one that cannot be enforced."²

^a *Ionides v. Pacific Insurance Co.*, (1871) L.R. 6 Q.B. 696.

^b By 56 & 57 Vict. c. 71, § 6 of the Sale of Goods Act such a condition is implied in every sale of goods.

^c (1882) 5 H.L.C. 673.

^d [1903] 2 Ch. (C.A.) 249.

¹ *Gibson v. Pelkie*, (1877) 37 Mich. 380; *Sherwood v. Walker*, (1887) 66 Mich. 568; *Kowalke v. Milwaukee &c. Co.*, (1899) 103 Wis. 472; *Allen v. Hammond*, (1837, U.S.) 11 Pet. 63; *Duncan v. Ins. Co.*, (1893) 138 N.Y. 88. Mistakes as to extrinsic facts or as to quality will not avoid a contract. *Hecht v. Batcheller*, (1888) 147 Mass. 335; *Wood v. Boynton*, (1885) 64 Wis. 265. But there seems to be a class of cases lying midway between mistakes as to existence and mistakes as to quality, where the mistake is as to the existence of some fundamental quality, the presence or absence of which is regarded by the parties as a material element in the contract: as the sterility or non-sterility of a cow, *Sherwood v. Walker*, *supra*; the productiveness or non-productiveness of land, *Irwin v. Wilson*, (1887) 45 Ohio St. 426; *Thwing v. Hall &c. Co.*, (1889) 40 Minn. 184; the denominational value of a coin, *Chapman v. Cole*, (1858) 12 Gray, 141; the presence of concealed valuables in an article sold, *Huthmacher v. Harris*, (1861) 38 Pa. 491.

² *Riegel v. Ins. Co.*, (1893) 153 Pa. 124. But if the contract is made,

Marine insurance policies usually contain the words "lost or not lost" in order to protect the assured against the possibility of this form of mistake.

188. **Supposed right non-existent.** The same rule applies where parties contract under a mutual belief that a *right* exists, which in fact is non-existent. If *A* agrees with *X* to hire or buy an estate from him which both believe to belong to *X*, but which is found to belong to *A*, the contract will not be enforced.¹ And this is not, as would at first sight appear, an infringement of the maxim "*ignorantia juris haud excusat.*"^a

"In that maxim," said Lord Westbury, "the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."^b

(c) *Mistake by one party as to the intention of the other, known to that other*

189. **General rules.** We come here to the limits of operative mistake in regard to the subject-matter of a contract, and must be very careful to define them so as to avoid confusion.

A general rule laid down in *Freeman v. Cooke*,^c and often cited with approval, may be taken to govern all cases in which one of two parties claims to repudiate a contract on the ground that his meaning was misunderstood, or that he misunderstood that of the other party.

^a *Bingham v. Bingham*, (1748) 1 Ves. Sen. 126.

^b *Cooper v. Phibbs*, (1867) L.R. 2 H.L. 170.

^c (1848) 2 Exch. 654.

both parties being conscious of their lack of knowledge of the fact, there is no mistake. Such is the case where the parties make a compromise agreement for the settlement of a claim the validity of which depends upon some fact the existence of which is unknown to them. They are ignorant, not mistaken; for their ignorance is conscious ignorance. *Sears v. Grand Lodge*, (1900) 163 N.Y. 374; *Sears v. Leland*, (1887) 145 Mass. 277; *Wood v. Boynton*, (1885) 64 Wis. 265; *Kowalke v. Mil. Elec. Co.*, (1899) 103 Wis. 472. See also *Hecht v. Batcheller*, (1888) 147 Mass. 335.

¹ If *X* warranted title, either there is no mistake (see note 1, *supra*) or the mistake is immaterial. *X* will be bound to pay damages for non-performance.

² *Martin v. McCormick*, (1854) 8 N.Y. 331; *Morgan v. Dod*, (1877) 3 Colo. 551; *O'Neal v. Phillips*, (1889) 83 Ga. 556. But see *McAninch v. Laughlin*, (1880) 13 Pa. 371; *Haden v. Ware*, (1849) 15 Ala. 149; *Leal v. Terbush*, (1883) 52 Mich. 100.

"If whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."¹

As regards the quantity and the price of the subject-matter concerned, a man's statement must usually be taken to be conclusive against himself.

As regards the quality of a thing sold, or the general circumstances of a contract entered into, a man must use his own judgment, or if he cannot rely upon his judgment, must take care that the terms of the contract secure to him what he wants.²

190. **Implied conditions.** In two cases the law will protect one of the parties to a contract.

Where goods are bought by description, or in reliance on the judgment of a seller who knows the purpose for which they are required, the Sale of Goods Act,^b 1893, introduces into the contract implied conditions that the goods supplied shall be of a merchantable quality, or reasonably fit for the purpose for which they are required. And where the sale is by sample, there are implied conditions that the bulk shall correspond with the sample, that the buyer shall have an opportunity for inspection, and that there shall be no defect not apparent on reasonable examination which would render the goods unmerchantable.³

And again, in certain contracts said to be "*uberrimae fidei*," in which one of the two parties is necessarily at a disadvantage as to knowledge of the subject-matter of the contract, the law requires the other to disclose every material fact, that is, every fact which might have influenced the mind of a prudent person.⁴

^a *Smith v. Hughes*, (1871) L.R. 6 Q.B. at p. 807. ^b 57 & 58 Vict. c. 71, §§ 14 & 15.

¹ *Mansfield v. Hodgdon*, (1888) 147 Mass. 304; *Phillip v. Gallant*, (1875) 62 N.Y. 256; *Coates v. Buck*, (1896) 93 Wis. 128; *Steinmeyer v. Schroepel*, (1907) 226 Ill. 9; *Grant Marble Co. v. Abbot*, (1910) 142 Wis. 279. But see *Rowland v. Ry.* (1891) 61 Conn. 103. See *ante*, § 31.

² That *caveat emptor* is the general rule, see *Grigsby v. Stapleton*, (1887) 94 Mo. 423; *Wolcott v. Mount*, (1873) 36 N.J. L. 262; *Winsor v. Lombard*, (1836) 18 Pick. 57.

³ The common law implies warranties of title, of correspondence with description, of correspondence with sample, where goods are ordered for a particular purpose of fitness for that purpose, and in some cases of merchantability. See Benjamin on Sales, §§ 647-73, and Bennett's Am. Notes. See *Wolcott v. Mount*, (1873) 36 N.J. L. 262; *Coplay Iron Co. v. Pope*, (1888) 108 N.Y. 232.

⁴ *Walden v. Louisiana Ins. Co.*, (1838) 12 La. 134; *Grigsby v. Stapleton*, (1887) 94 Mo. 423.

191. Words and acts control. Beyond this, where the terms of a contract are clear, the question is, not what the parties *thought*, but what they *said* and *did*.

Construction of words. Suppose that A sells to X, and X believes that he is buying, a bar of gold: the bar turns out to be brass. The parties are honestly mistaken as to the subject-matter of the contract, both believed the bar to be gold. But their rights are not affected by their state of mind; they depend on the answer to the question — Did A purport to sell to X a bar of metal, or a bar of gold? A contract for a bar of gold is not performed by the delivery of a bar of brass; but a contract for a bar of metal is performed by the delivery of a bar of metal. It does not matter what the metal may be, nor does it matter what the parties may have thought that it was.¹

Let the bargainer beware. There are two things which have to be considered by one who is entering into a contract. The first is what he wants the other party to supply, to do, or to forbear: that is, the matter of his bargain. The second is the statements, promises, and conditions of which the contract consists: the terms of his bargain. As to these things, and subject to the exceptions which I have mentioned, a contracting party must take care of himself; he cannot expect the other party to correct his judgment as to the matter of his bargain, or ascertain by cross-examination whether he understands its terms.

Known mistake as to promise. But the law will not allow a man to make or accept a promise, which he *knows* that the other party understands in a different sense from that in which he understands it himself.²

192. Illustrations. We can best illustrate these propositions by an imaginary sale.

A sells X a piece of china.

(a) *Mistake as to thing.* X thinks it is Dresden china, A thinks it is not. Each takes his chance. X may get a better thing than A intended to sell, or a worse thing than he himself intended to buy; in neither case is the validity of the contract affected.³

(b) *Known mistake as to thing.* X thinks it is Dresden china. A knows that X thinks so, and knows that it is not.

The contract holds. A must do nothing to deceive X, but he

¹ Wood v. Boynton, (1885) 64 Wis. 265. Compare Sherwood v. Walker, (1887) 66 Mich. 568; Chapman v. Cole, (1858, Mass.) 12 Gray, 141.

² Cleghorn v. Zumwalt, (1890) 83 Cal. 155; Haviland v. Willets, (1894) 141 N.Y. 35.

³ Wood v. Boynton, *supra*.

is not bound to prevent *X* from deceiving himself as to the *quality* of the article sold.¹

(c) *Mistake as to promise.* *X* thinks that it is Dresden china and thinks that *A* intends to sell it as Dresden china; and *A* knows it is not Dresden china, but does not know that *X* thinks that he intends to sell it as Dresden china. The contract says nothing of Dresden, but is for a sale of china in general terms.

The contract holds. The misapprehension by *X* of the extent of *A*'s promise, if *unknown to A*, has no effect. It is not *A*'s fault that *X* omitted to introduce terms which he wished to form part of the contract.²

(d) *Known mistake as to promise.* *X* thinks it is Dresden china, and thinks that *A* intends to sell it as Dresden china. *A* knows that *X* thinks he is promising Dresden china, but does not mean to promise more than china in general terms.

The contract is void.³ *X*'s error was not one of judgment as to the quality of the china, as in (b), but regarded the quality of *A*'s promise, and *A*, knowing that his promise was misunderstood, allowed the mistake to continue.⁴

The last instance given corresponds to the rule laid down in *Smith v. Hughes*.⁵ In that case Hughes was sued for refusing to accept some oats which he had agreed to buy of Smith; he alleged that he had intended and agreed to buy old oats, and that those supplied were new. The Court of Queen's Bench held that to avoid the sale Smith must be proved to have known that Hughes thought he was being promised old oats. Smith might recover if he had known that Hughes thought he was *buying* old oats; not so if he knew that Hughes thought he was *being promised* old oats.

¹ (1871) L.R. 6 Q.B. 597.

² See *Laidlaw v. Organ*, (1817, U.S.) 2 Wheat. 178; *Peoples' Bank v. Bogart*, (1880) 81 N.Y. 101. Cf. *Brown v. Montgomery*, (1859) 20 N.Y. 287.

³ *Wheat v. Cross*, (1869) 31 Md. 99. We must consider not merely what *A* knew, but also what he ought to have known as a man of reasonable prudence.

⁴ In most such cases there would be a contract by estoppel, at least where the understanding of *X* as to the terms of the contract was reasonable and was caused by the words or conduct of *A*. Non-performance by *X* of the supposed promise would have the same effect as any other breach of contract.

⁵ *Shelton v. Ellis*, (1883) 70 Ga. 297; *Haviland v. Willets*, (1894) 141 N.Y. 35; *Thayer v. Knots*, (1898) 59 Kans. 181; *Parrish v. Thurston*, (1882) 87 Ind. 437; *Harran v. Foley*, (1885) 62 Wis. 584; *Davis v. Reisinger*, (1907) 120 N.Y. App. D. 766. These are generally treated as cases of fraud. *Stewart v. Wyoming Ranch Co.*, (1888) 128 U.S. 333.

Blackburn, J., said, "In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality." (This is instance a.)

"And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor." (This is instance b.)

And Hannen, J., said, "It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. . . . But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in a case of sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor." *Scott v. Littledale*.^a (This corresponds to instance c.)

And further he says, "If, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was the apparent, and not the real bargain." (This corresponds to instance d.)¹

Scriven v. Hindley^b affords a further illustration. The plaintiffs instructed an auctioneer to sell certain bales of hemp and tow, which were described in the catalogue as so many bales in different lots with no indication of the difference in their contents. The defendant examined samples of the hemp before the sale, intending to bid for the hemp alone. The tow was put up for sale, and the defendant made a bid which was accepted. The bid was a reasonable one if it had been for tow, but an excessive one for hemp. The jury found that the auctioneer intended to sell tow and that the defendant intended to bid for hemp, and that the auctioneer believed that the bid was made under a mis-

^a (1858) 8 E. & B. 815. This case puts, from the seller's point of view, the principle which we have been illustrating from the point of view of the buyer. The seller means to promise one thing; he in fact promises another; the fact that he thinks he is promising something less than he does promise has no effect on the validity of the sale.

^b [1913] 3 K.B. 564.

¹ The reasoning of this case was adopted in the very curious case of *Gill v. M'Dowell*, [1903] 2 I.R. 463. The outworn doctrine of *caveat emptor* caused the court to be very astute to find that there was a mistake, known to the defendant, as to the terms of the contract.

take when he accepted it. On these findings it was held that the parties were never *ad idem*, and judgment was entered for the defendant.

In *Smith v. Hughes* the case was sent back for a new trial on the ground that the judge in the court below had not directed the jury with sufficient clearness as to the nature of such mistake as will enable one party successfully to resist an action brought by the other for non-performance of a contract which is not in its terms ambiguous.

193. Application of rule in equity. But a series of equity cases illustrates the rule that when one man knows that another understands his promise in a different sense from that in which he makes it the transaction will not be allowed to stand.

In *Webster v. Cecil* ^a specific performance of a contract was refused on the ground of mistake of this nature, although it was suggested that damages might be recovered in a common-law court for non-performance.

The parties were in treaty for the purchase of some plots of land belonging to Cecil. Webster, through his agent, offered £2000, which was refused. Afterwards Cecil wrote to Webster a letter containing an offer to sell at £1200; he had intended to write £2100, but either cast up the figures wrongly or committed a clerical error. Webster accepted by return of post. Cecil at once tried to correct the error, but Webster, though he must have known from the first that the offer was made in mistaken terms, claimed that the contract should be performed and sued for specific performance. This was refused: the plaintiff was left to such action at law as he might be advised to bring.¹ The case was described later as one "where a person snapped at an offer which he must have perfectly well known to be made by mistake." ^{b 2}

The power of the Court of Chancery in former times, of the Chancery Division now, to rectify deeds or written instruments is as a rule reserved for cases where the parties had agreed and the terms of the agreement, by fault of neither, failed to express their meaning.

^a (1891) 30 Beav. 62.

^b Per James, L.J., *Tamplin v. James*, (1890) 15 Ch. D. 221.

¹ An action for damages at law ought equally to fail.

² *Shelton v. Ellis*, *supra*; *Chute v. Quincy*, (1892) 156 Mass. 189 (specific performance refused, but court declined to rescind the contract); *Burkhalter v. Jones*, (1884) 32 Kans. 5 (specific performance denied); *Mansfield v. Sherman*, (1889) 81 Me. 365 (specific performance denied); *Sullivan v. Jennings*, (1888) 44 N.J. Eq. 11 (specific performance denied).

But a contract may be rectified where mistake is not mutual. In such cases — and they are not numerous — one of the parties has known that when the other made a promise he was in error as to the nature or extent of it. The promisee is not then allowed to take advantage of the error. Or an offer is made in terms which, from the tenor of previous negotiations, the offeree, when he accepts, must know to include more than the offeror meant to include. The court tells the offeree, in substance, that his agreement must be either rectified or canceled, and that he may take his choice.

A and X signed a memorandum of agreement by which A promised to let certain premises to X "at the rent of £230, in all respects on the terms of the within lease": and this memorandum accompanied a draft of the lease referred to. A, in filling in the blank in the draft for the amount of rent to be paid, inadvertently entered the figures £130 instead of £230; and the lease was engrossed and executed with this error. The court was satisfied, upon the evidence, that X was aware that A believed her to be promising to pay a rent higher than that which she was actually promising, and she was given the option of retaining the lease, amended so as to express the real intention of the parties, or of giving up, and paying at the rate of £230 per annum for such use and occupation of the premises as she had enjoyed.^a

Harris v. Pepperell^b and *Page v. Marshall*^c were cases in which the defendant accepted an offer which he must have known to express something which the offeror did not intend to express. The defendant was offered the alternative of cancellation or rectification. In these cases the promise was sought to be set aside; in *Webster v. Cecil* it was sought to be enforced. Otherwise the circumstances are the same.^{d 1}

^a *Gerrard v. Frankel*, (1862) 30 Beav. 445.

^b (1867) L.R. 5 Eq. 1.

^c (1884) 28 Ch. D. 255.

^d It is sufficient to notice here a suggestion made by Farwell, J., in *May v. Platt*, (1900) 1 Ch. 616, that this alternative of rectification or rescission is only given where there is misrepresentation amounting to fraud. He treats the decisions cited in the text as cases of fraud. This dictum was unnecessary for the decision of the case in question, which was a simple one of failure of performance to carry out the terms of a contract; it is not borne out by the language of the judges in the cases cited.

¹ An alternative decree for rescission or reformation at the option of the defendant was entered in these cases: *Brown v. Lamphear*, (1862) 35 Vt. 252; *Lawrence v. Staigg*, (1866) 8 R.I. 256. See 2 Ames' Cases in Eq. Juris., p. 242 note. If in these cases it is clearly proved that the terms offered were really known to the other party, and that he accepted with knowledge of the mistake in expression, the remedy should be rectification, with specific performance or damages. See *Kilmer v. Smith*, (1879) 77 N.Y. 226. But if it cannot be proved with certainty what the knowledge of the

(4) *Effect of mistake*

194. **Mistake prevents formation of contract.** Where mistake, within the limits that we have described, affects the formation of a contract, no true contract comes into existence; it is void *ab initio*. The common law therefore offers two remedies to a person who has entered into an agreement void on the ground of mistake. If it be still executory he may repudiate it and successfully defend an action brought upon it;¹ or if he have paid money under the contract, he may recover it back upon the general principle that "where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, an action will lie to recover it back."² And this is so even though the person paying the money did not avail himself of all the means of knowledge open to him.³

In equity the victim of mistake may resist specific performance of the contract, and may sometimes do so successfully even though he might not have been able to defend at law an action for damages arising from its breach;⁴ in other words equity takes cognizance of mistake in a wider sense than that given to it at common law, and is more stringent than the common law in preventing one of two parties from taking advantage of a mistake which he knew the other party to be making.⁴ The injured party may also as plaintiff apply to the Chancery Division of the High Court to get the contract set aside and to be freed from his liabilities in respect of it.⁴

^a *Kelly v. Solari*, (1841) 9 M. & W. 58.

^b *Imp. Bank of Canada v. Bank of Hamilton*, [1903] A.C. 56.

^c *Webster v. Cecil*, (1861) 30 Beav. 62.

^d *Paget v. Marshall*, (1884) 23 Ch. D. 255.

offeree was, the alternative of rescission with a quasi-contractual duty to pay for benefits received does practical justice. The flexibility of equity gives it some advantage over the common law, where the jury is assumed to be infallible and no compromise measure on the ground of uncertainty as to the facts is available.

¹ *Gibson v. Pelkie*, (1877) 37 Mich. 380; *Sherwood v. Walker*, (1887) 66 Mich. 568.

² *Wood v. Sheldon*, (1880) 42 N.J. L. 421; *Martin v. McCormick*, (1854) 8 N.Y. 331; *Stanley & Co. v. Bailey*, (1878) 45 Conn. 464; *Rodliff v. Dalinger*, (1886) 141 Mass. 1. This is fully treated in works on Quasi-Contracts.

³ *Chute v. Quincy*, (1892) 156 Mass. 189 (specific performance refused, but rescission also refused).

⁴ It is believed that this is true only in so far as the more flexible procedure in equity permits a greater variety of remedy. See preceding page, note 1.

⁵ *Haviland v. Willets*, (1894) 141 N.Y. 35; *Page v. Higgins*, (1889) 150 Mass. 27; *Shelton v. Ellis*, *supra*.

II. INNOCENT MISREPRESENTATION

195. Distinctions. In dealing with misrepresentation as a circumstance invalidating contract we must keep before us two distinctions. We must carefully separate innocent misrepresentation of fact from wilful misrepresentation of fact, or fraud: and we must separate with equal care representations, or statements which are preliminary to and perhaps induce the making of a contract, from the terms contained in the completed contract itself.

With these distinctions in view, we may hope to encounter successfully the difficulties which meet us in determining the effect of innocent misrepresentation in contract.

(1) We must, firstly, distinguish innocent misrepresentation from fraud, and must consider whether honesty of motive or ignorance of fact can remove a statement in fact false from the category of fraud.

(2) We must, secondly, bear in mind that a man may, during the preliminary bargaining, make statements of fact which are afterwards embodied in the contract itself in the form of an undertaking or warranty that certain things *are*; just as he may promise that certain things *shall be*. In either case the undertaking or promise is a term of the contract. On the other hand he may make, during the preliminary bargaining, statements of fact, intended by neither party to be terms of the subsequent contract, but which, nevertheless, may seriously affect the inclination of one party to enter into it.

Representation therefore may introduce terms into a contract and affect performance: or it may induce a contract and so affect the intention of one of the parties, and the formation of the contract. It is with this last that we have to do, and here the terminology of this part of the subject is extraordinarily confused. Representation, condition, warranty, independent agreement, implied warranty, warranty in the nature of a condition, are phrases which it is not easy to follow through the various shades of meaning in which they are used.

(3) We must, thirdly, take note of the effect of the Judicature Act, combined with subsequent decisions, in modifying the rules of common law and expanding those of the chancery in respect of innocent misrepresentations made prior to the formation of a contract.

We shall see that, as a result of this combination and expan-

sion of earlier rules, material misrepresentation is now an invalidating circumstance in all contracts, while even non-disclosure of fact will affect contracts of a special sort known as contracts "*uberrimae fidei*," in which the utmost good faith and accuracy of statement is required.

These difficulties will be dealt with in order.

(1) *Innocent misrepresentation distinguished from fraud*

196. **Fraud as a tort.** Fraud differs from innocent misrepresentation in that one does, and the other does not, give rise to an action *ex delicto*. Fraud is a wrong in itself, and may be treated as such, besides being a vitiating element in contract. Innocent misrepresentation may vitiate a contract, but never gives rise to an action *ex delicto*, the action of deceit.¹

"It must be borne in mind," says Cotton, L.J., "that in an action for setting aside a contract which has been obtained by misrepresentation, the plaintiff may succeed though the misrepresentation was innocent; but in an action of deceit, the representation to found the action must not be innocent, that is to say it must be made either with a knowledge of its being false or with a reckless disregard as to whether it is or is not true."^a

But a false statement may be made knowingly, yet not with a bad motive: on the other hand, it may be made with no certain knowledge that it is false, but nevertheless with a dishonest motive for wishing it to be believed by the party to whom it is made.

^a *Arkwright v. Newbold*, (1881) 17 Ch. D. 320.

¹ This distinction is generally observed throughout the United States. *Cowley v. Smyth*, (1884) 46 N.J. L. 380; *Taylor v. Leith*, (1875) 26 Ohio St. 428; *Da Lee v. Blackburn*, (1873) 11 Kans. 190; *Tucker v. White*, (1878) 125 Mass. 344; *Wakeman v. Dalley*, (1872) 51 N.Y. 27. But in at least two jurisdictions an action for damages will lie for innocent misrepresentations. "The doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby, either at law or in equity." *Morse, J.*, in *Holcomb v. Noble*, (1888) 69 Mich. 396; *Johnson v. Gulick*, (1896) 46 Neb. 817; and see also, *Davis v. Nuzum*, (1888) 72 Wis. 439; *Huntress v. Blodgett*, (1910) 206 Mass. 318; *Lehigh Z. & I. Co. v. Bamford*, (1893) 150 U.S. 665. And a few jurisdictions, while denying an independent action in such cases, allow the defendant to set up the damages by way of counter claim to an action for the price. *Mulvey v. King*, (1883) 39 Ohio St. 491; *Loper v. Robinson*, (1881) 54 Tex. 510; but see *McIntyre v. Buell*, (1892) 132 N.Y. 192; *King v. Eagle Mills*, (1865, Mass.) 10 Allen, 548; *First Nat. Bk. v. Yocum*, (1881) 11 Neb. 328.

197. **Deceit without dishonest motive.** Let us take the first of these cases.

"It is fraud in law if a party make representations which he knows to be false and injury ensues, although the motives from which the representations proceeded may not have been bad."^a

In *Polhill v. Walter*,^b Walter accepted a bill of exchange drawn on another person: he represented himself to have authority from that other to accept the bill, honestly believing that the acceptance would be sanctioned, and the bill paid by the person for whom he professed to act. The bill was dishonored at maturity, and an indorsee, who had given value for the bill on the strength of Walter's representation, brought against him an action of deceit. He was held liable, and Lord Tenterden in giving judgment said:

"If the defendant when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence."

It will be observed that in this case the representation was *known to be false*; it is therefore clearly distinguishable from a class of cases in which it has finally been held that a representation in fact false but *honestly believed to be true* by the party making it, will not give rise to the action of deceit.^{c 1}

198. **Reckless misstatements.** On the other hand it is not necessary, to constitute fraud, that there should be a clear knowledge that the statement made is false. Statements which are intended to be acted upon, if made recklessly and with no reasonable ground of belief, may furnish such evidence of a dishonest mind as to bring their maker within the remedies appropriate to fraud.

Where directors issue a prospectus setting forth the advantages of an undertaking into the circumstances of which they have not troubled themselves to inquire, and inducing those who read the prospectus to incur liabilities in respect of the undertaking, they commit a fraud if the statements contained in

^a Per Tindal, C.J., *Foster v. Charles*, (1830) 7 Bing. 107.

^b (1832) 3 B. & Ad. 114.

^c *Derry v. Peak*, (1889) 14 App. Cas. 337.

¹ *McKown v. Furgason*, (1878) 47 Iowa, 636; *Salisbury v. Howe*, (1881) 87 N.Y. 128, 135; *Kountze v. Kennedy*, (1895) 147 N.Y. 124.

the prospectus are untrue; for they represent themselves to have a belief which they know they do not possess."¹

199. **Deceit and misrepresentation distinguished.** In the cases which we have just considered there is a statement of fact accompanied either with knowledge of falsehood or else with intention or willingness to deceive. Herein innocent misrepresentation differs from fraud: for innocent misrepresentation is a misstatement of facts not known to be false or a non-disclosure of facts not intended to deceive; whereas fraud is a statement known to be false, or made in ignorance as to its truth or falsehood, but confidently, so as to represent that the maker is certain when he is uncertain. The injured party is then entitled to the action of deceit.²

² *Reese River Mining Co. v. Smith*, (1869) L.R. 4 H.L. 64.

¹ It is everywhere held that actual knowledge of falsity, or reckless disregard of truth or falsity, will be sufficient to found an action in tort for deceit. In addition some states hold that a positive statement of a fact susceptible of actual knowledge, made as of one's own knowledge, will if false be sufficient. *Chatham Furnace Co. v. Moffatt*, (1888) 147 Mass. 403; *Weeks v. Currier*, (1896) 172 Mass. 53. For a full discussion of the nice distinctions possible herein and of the many specific divisions, see Williston, "Liability for Honest Misrepresentation," 24 *Harvard Law Review*, 415, 427-40. In a few states negligent statements are apparently held sufficient. *Seale v. Baker*, (1888) 70 Tex. 283; *Gerner v. Mosher*, (1899) 58 Neb. 135; *Hoffman v. Dixon*, (1900) 105 Wis. 315. See Smith, 14 *Harvard Law Review*, 184.

² As the preceding notes indicate, there are these possible cases: (1) a statement known to be false; (2) a statement made with reckless disregard of its truth or falsity; (3) a statement of a fact susceptible of accurate knowledge made as of one's own knowledge, but believed to be true; (4) a statement made negligently, that is without reasonable grounds for believing it to be true, but believed to be true; (5) a statement as to authority made by an agent even though believed on reasonable grounds to be true. The first two cases are clearly actionable deceit. The last case is treated as an implied warranty of authority. The third and fourth cases lead to divergent decisions, but they seem to be substantially identical. The basis of the defendant's liability in such cases is not deceit or fraud, but rather *negligence*. The plaintiff's right is to recover the amount of his loss, and does not depend upon enrichment of the defendant. If there is such enrichment, the plaintiff may no doubt recover on the theory of a non-contract debt (or quasi-contract) and waiver of tort. In the absence of enrichment of the defendant, there is no strong reason for classifying the plaintiff's claim as quasi-contractual. He is suing for the amount of his loss, caused by the act of the defendant, such act being that of a man not reasonably prudent. Cf. Williston, 24 *Harvard Law Review*, 415, 420, 436. It is possible that the rule should be regarded as one of *absolute* liability and that the plaintiff should not be required to prove negligence. But even if so, the liability properly falls in the field of tort, and exists for the purpose of inducing a high degree of care and thus preventing damage. The rule would be, in that case, what Professor Wigmore calls a "prophylactic rule." See in general, Smith, "Liability for Negligent Language," 14 *Harvard Law Review*, 184; Bigelow on Torts (7th ed.), §§ 139-44; Burdick on Torts, pp. 372-74. See § 223, *post*.

(2) *Representations inducing a contract distinguished from terms of a completed contract*

200. **Representations and terms.** Equally important with the distinction between innocent misrepresentation and fraud is the distinction between the terms of a completed contract and statements which are inducements to enter into a contract.^a

Much subtlety of reasoning has been wasted because, where a man has in good faith made a promise which he is ultimately unable to perform, it has been said that his promise was misrepresentation, or was made under a mistake of fact, and so questions proper to the performance or breach of contract have been mixed with questions relating to the formation of contract.^b

We must bear in mind, first, that a representation which is subsequently made part of the contract ceases to be a representation, and becomes a promise that a certain thing is or shall be; and next, *that unless a representation is made part of the contract*, its untruth (in the absence of fraud) gives rise to no claim for damages.^c

201. **Representations, conditions, and warranties.** At common law, therefore, if a representation did not afterwards become a substantive part of the contract, its untruth (save in certain excepted cases and apart always from fraud) was immaterial. But if it did, it might be one of two things: (1) it might be regarded by the parties as a vital term going to the root of the contract (when it is usually called a "condition"); and in this case its untruth entitles the injured party to repudiate the whole contract; or (2) it might be a term in the nature only of an independent subsidiary promise (when it is usually called a "warranty"), which is indeed a part of the contract, but does not go to the root of it; in this case its untruth only gives rise to an action *ex contractu* for damages, and does *not* entitle the injured party to repudiate the whole contract.

Whether a term is to be regarded as a condition or a warranty is a matter of construction for the court to determine.

^a Other difficulties have arisen from a view at one time entertained by courts of equity, that there may be representations which are not terms in a contract but which ought nevertheless to be made good by the party responsible for them. Such representations, in the cases where they occur, can all be resolved into terms of a contract. I touch at the close of this chapter on representation which creates an *estoppel*, and so may prevent the disproof of an alleged right; but this is a different thing from the theory advanced in *Coverdale v. Eastwood*, (1872) 15 Eq. 121.

^b *Kennedy v. Panama Steam Co.*, (1867) L.R. 2 Q.B. 580.

^c *De Lusselle v. Guildford*, [1901] 2 K.B. 215.

But two points must be borne in mind. In the first place, the words "condition" and "warranty" are not invariably kept as distinct as accuracy of definition demands; and in insurance law especially "warranty" is very commonly used in the sense ascribed to "condition" above.^a In the second place, the injured party, if he chooses to waive his right to repudiate the contract on breach of a condition, may still bring an action for such damages as he has sustained.¹

202. *Illustrations.* The common-law rules on the subject of conditions, warranties and representations may be illustrated from the judgments delivered in the three cases of *Behn v. Burness*,^b *Wallis v. Pratt*,^c and *Heilbut v. Buckleton*.^d

In the case of *Behn v. Burness*, an action was brought upon a charter party dated the 19th day of October, 1860, in which it was agreed that Behn's ship "now in the port of Amsterdam" should proceed to Newport and there load a cargo of coals which she should carry to Hong Kong. At the date of the contract the ship was not in the port of Amsterdam and did not arrive there until the 23d. When she reached Newport, Burness refused to load a cargo and repudiated the contract. Thereupon action was brought, and the question for the court was whether the words "now in the port of Amsterdam" amounted to a condition the breach of which entitled Burness to repudiate the contract, or whether they only gave him a right, after carrying out the contract, to sue for such damages as he had sustained. The Exchequer Chamber held it to be a condition,² and Williams, J., in giving the judgment of the court, thus distinguishes the various parts or terms of a contract:

"Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events, marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its un-

^a See Marine Insurance Act, 1906, §§ 33-41.

^b (1863) 3 B. & S. 751.

^c [1910] 2 K.B. 1003.

^d [1913] A.C. 30.

¹ But see *post*, § 203, note 4.

² *Davidson v. Von Lingen*, (1884) 113 U.S. 40; *Gray v. Moore*, (1889) 37 Fed. 286; *Wells, Fargo & Co. v. Pacific Ins. Co.*, (1872) 44 Cal. 397; *Morrill v. Wallace*, (1837) 9 N.H. 111; *Wolcott v. Mount*, (1873) 36 N.J.L. 262.

truth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. . . . Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question however may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract.¹ This is a question of construction which the court and not the jury must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages."

The distinction referred to in the last words of the passage quoted is amplified in the judgment of Fletcher Moulton, L.J., in *Wallis v. Pratt*:^a

"There are some [obligations] which go so directly to the substance of the contract, or in other words are so essential to its very nature, that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations which though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former he has the alternative of treating the contract as completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognizing this distinction between the two classes of obligations under a contract, there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss this matter, because later usage has consecrated the term 'condition' to describe an obligation of the former class and 'warranty' to describe an obligation of the latter class. . . . A condition and a warranty are alike obligations under a contract a breach of which entitles the other party to damages. But in the case of a breach of a condition, he has the option of another and a higher remedy, namely, that of treating the contract as repudiated."²

^a [1910], 2 K.B. 1003, 1012; [1911] A.C. 394.

¹ It is not very happily expressed to say that a written representation is not "an integral part" or "a substantive part" of the contract. We need only say here that the truth of a representation is sometimes a condition and sometimes not.

² But cf. § 203, note 4.

In *Heilbut v. Buckleton*^a the action was for fraudulent misrepresentation and for breach of warranty. The jury negatived fraud, but found that a statement made by the defendants' manager in answer to a question before the contract was concluded was a warranty. The House of Lords held that there was no evidence on which the jury could so find, and Lord Moulton (as he then had become) said:

"The statement made in answer to the plaintiff's question was beyond controversy a mere statement of fact, for it was in reply to a question for information and nothing more. No doubt it was a representation as to fact, and indeed it was the actual representation upon which the main case of the plaintiff rested. . . . The whole cause for the existence of collateral contract therefore rests on the mere fact that the statement was made as to the character of the company, and if this is to be treated as evidence sufficient to establish the existence of a collateral contract of the kind alleged the same result must follow with regard to any other statement relating to the subject-matter of a contract made by a contracting party prior to its execution. This would negative entirely the firmly established rule that an innocent representation gives no right to damages. It would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true and therefore to give a right to damages if such should not be the case."

A judgment of Holt, C.J., was cited with approval to the effect that "an affirmation at the time of the sale is a warranty, *provided it appear on evidence to be so intended*,"^b and the opinion of the Court of Appeal in a later case that in determining whether it was so intended a "decisive test" is whether the offender assumes to assert a fact of which the buyer is ignorant was emphatically rejected.^c Words which on the face of them appear to be simply representations of fact, said Lord Haldane, may import a contract of warranty, *but only if the context so requires*.^d

203. Definitions of the terms. The three judgments cited enable us to get a clear idea of the various terms in a contract.

(a) *Representations*, made at the time of entering into the contract, but not intended by both parties to form a part of it, have no effect on its validity, unless they are fraudulent. When this is the case, their falsehood vitiates the formation of the contract and makes it voidable.

(b) *Conditions*^e are terms which are of the essence of the con-

^a [1913] A.C. 30.

^b *Crosse v. Gardner*, (1689) Carth. 90.

^c *De Lasalle v. Guildford*, [1901] 2 K.B. 215, 221.

^d *Heilbut v. Buckleton*, [1913] A.C. 30, 37.

^e For a fuller discussion of the terms "Condition" and "Warranty" see chaps. xiii, xv.

tract.¹ When a term in the contract is construed by the court as a condition, then, whether it be a statement or a promise, the untruth, or the breach, of it will entitle the party to whom it is made to be discharged from his liabilities under the contract.²

(c) *Warranties [ab initio]* are independent subsidiary promises, the breach of which does not discharge the contract, but gives to the injured party a right of action for such damage as he has sustained by the failure of the other to fulfill his promise.³

(d) *Warranties [ex post facto]*. A condition may be broken and the injured party may not avail himself of his right to be discharged, but continue to take benefit under the contract, or at any rate to act as though it were still in operation. In such a case the condition sinks to the level of a warranty, and the breach of it, being waived as a discharge, can only give a right of action for the damage sustained.⁴

¹ This term *condition* is generally used to describe any fact, subsequent to the formation of a contract, which operates to make the duty of a promisor immediately active and compelling. Such a fact may be described as such in a term of the contract or it may not. In either event, the term of the contract should not itself be called the condition. This is more fully discussed later, § 355 *et seq.* It is not uncommon, popularly, to speak of a condition of the contract as synonymous with *term* or *provision* of the contract. This should be avoided.

² The non-fulfillment of a condition (i.e., the non-existence of the necessary, operative fact) does not discharge all the legal relations that compose a contract. It does, however, prevent the existence of the promisee's right and of the promisor's duty, and it discharges the promisor's pre-existing liability that a duty might come into existence. The promisor still retains a power, by waiver or otherwise, to renew the previous legal relations, at least in some degree. See *post*, § 363.

³ "A warranty is a separate, independent, collateral stipulation . . . for the existence or truth of some fact relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor." Shaw, C.J., in *Dorr v. Fisher*, (1848, Mass.) 1 Cush. 271, 273-74. But there is a conflict of authority as to whether a breach of an express warranty will enable the injured party to rescind the contract. See 16 *Harvard Law Review*, 465; 4 *Columbia Law Review*, 1, 195, 264.

⁴ This statement is true only in case the condition is a fact the existence or fulfillment of which is assured by a promise. If its fulfillment is not promised, a waiver of the condition nullifies its effect as a condition without giving any right of action for damages.

See § 190 *ante* for the implied conditions in the sale of goods. Whether they survive acceptance of the goods and may be enforced as implied warranties the American cases are not agreed. The weight of authority favors the view that an implied warranty survives acceptance. *Morse v. Moore*, (1891) 83 Me. 473; *Northwestern Cordage Co. v. Rice*, (1896) 5 N.Dak. 432; *English v. Spokane Comm. Co.*, (1893) 57 Fed. 451; *Gould v. Stein*, (1889) 149 Mass. 570; *Wolcott v. Mount*, *supra*. But there is strong author-

(3) *Effect of innocent misrepresentation and remedies therefor*

204. **Outline.** In order to ascertain the effect of innocent misrepresentation or non-disclosure upon the formation of contract, I will first compare the attitude of common law and of equity toward innocent misrepresentation before the Judicature Act, and then consider how far the provisions of the Judicature Act, interpreted by judicial decision, enable us to lay down in general terms a rule which was previously applicable only to a special class of contracts.

205. **Anterior representations at law.** The case of *Behn v. Burness* shows that in the view of the common-law courts a representation was of no effect unless it was either (1) fraudulent, or (2) had become a term in the contract: the case of *Bannerman v. White*^a shows that the strong tendency of judicial decision was to bring, if possible, into the terms of the contract, any statement which was material enough to affect consent.

Bannerman offered hops for sale to White. White asked if any sulphur had been used in the treatment of that year's growth. Bannerman said "no." White said that he would not even ask the price if any sulphur had been used. They then discussed the price, and White ultimately purchased by sample the growth of that year; the hops were sent to his warehouse, were weighed, and the amount due on their purchase was thus ascertained. He afterwards repudiated the contract on the ground that sulphur had been used in the treatment of the hops. Bannerman sued for their price. It was proved that he had used sulphur over 5 acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made as to the use of sulphur was not wilfully false, and they further found that "the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale, and a warranty by the plaintiff." The court had to consider the effect of this finding, and held that Bannerman's repre-

^a (1861) 10 C.B. (N.S.) 844.

ity to the contrary. *Reed v. Randall*, (1864) 29 N.Y. 358; *Coplay Iron Co. v. Pope*, (1888) 108 N.Y. 232 [but see *Zabriskie v. Ry.*, (1892) 131 N.Y. 72]; *Lee v. Bangs*, (1890) 43 Minn. 23; *Williams v. Robb*, (1895) 104 Mich. 242; *Jones v. McEwan*, (1891) 91 Ky. 373. See *Mechem on Sales*, §§ 1392, 1393.

sensation was a part of the contract, a true condition, the breach of which discharged White from liability to take the hops.

Erle, C.J., said:

"We avoid the term *warranty* because it is used in two senses, and the term *condition* because the question is whether that term is applicable. Then, the effect is that the defendants required, and that the plaintiff gave his *undertaking* that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

"The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used: and upon this ground we agree that the rule should be discharged."^a

Note that in this case the representation was made before the parties commenced bargaining; whereas the representation in *Behn v. Burness* was a term in the charter party.

Note, further, that the actual legal transaction between the parties was an agreement to sell by sample a quantity of hops, a contract which became a sale,^b so as to pass the property, when the hops were weighed and their price thus ascertained. The contract of sale contained no terms making the acceptance of the hops conditional on the absence of sulphur in their treatment: and the language of Erle, C.J., shows that he felt it difficult to apply the terms "condition" or "warranty" to the representation made by the plaintiff.

"The undertaking," he says, "was a preliminary stipulation"; to introduce it into the contract was to include in the contract the discussion preliminary to the bargain. What had happened was that Bannerman made a statement to White, and then the two made a contract which did not include this statement, though but for the statement the parties would never have entered on a discussion of terms. The consent of the buyer was, in fact, obtained by a misrepresentation of a material fact, and was therefore unreal,¹ but the common-law courts had precluded

^a *Bannerman v. White*, (1861) 10 C.B. (N.S.) 860.

^b For the distinction between a sale, and an agreement to sell, see § 113, *supra*, and Sale of Goods Act, 1893, 56 & 57 Viet. c. 71, § 1.

¹ This form of expression is objectionable. The consent was real; but the duty to pay was conditional, because the parties so expressed themselves.

themselves from giving any effect to a representation unless it was a term in the contract, and so in order to do justice they were compelled to construe the contract as though it contained this term.¹

206. *Anterior representations in equity.*² In considering the principles on which equity has dealt with innocent misrepresentation and non-disclosure of fact we must bear in mind that certain classes of contracts have always been regarded as needing more exact and full statement than others of every material fact which might influence the minds of the parties. Some of these were of a sort with which the court of chancery was more particularly concerned — contracts to take shares in companies — contracts for the sale and purchase of land.

We must also remember that judges in the court of chancery never had occasion to define fraud with precision as an actionable wrong. They therefore, not unnaturally, used the term "fraudulent" as applicable to all cases in which they refused specific performance or set aside an instrument on the ground that one of the parties had not acted in good faith; and somewhat unfortunately they applied the same term to representations which were made in good faith though they afterwards turned out to be untrue.

But we find no general rule as to the effect of innocent misrepresentation until 1873, when, in a case precisely similar to

¹ The effect of innocent misrepresentation in the common law may be thus stated: (1) No action in tort for deceit will lie (but *contra* in Michigan and Nebraska). (2) A counterclaim for damages based upon innocent misrepresentation cannot be interposed to an action for the price. *King v. Eagle Mills*, (1865, Mass.) 10 Allen, 548; *Shook v. Singer Mfg. Co.*, (1878) 61 Ind. 520; *Scroggin v. Wood*, (1893) 87 Iowa, 497; *McIntyre v. Buell*, (1892) 132 N.Y. 192; but see *Mulvey v. King*, (1883) 39 Ohio St. 491; *Loper v. Robinson*, (1881) 54 Tex. 510. (3) There can be no rescission in any form of common-law action, as for example replevin. *Johnston v. Bent*, (1890) 93 Ala. 160; *Barnett v. Speir*, (1894) 93 Ga. 762; *Gregory v. Schoenel*, (1876) 55 Ind. 101; *Pike v. Fay*, (1869) 101 Mass. 134; *Hotchkiss v. Bank*, (1891) 127 N.Y. 329. But it has been suggested, and even held, in some cases that since the union of law and equity the equity rule should be followed in common-law cases. *Frenzel v. Miller*, (1871) 37 Ind. 1; *Brooks v. Riding*, (1874) 46 Ind. 15 (but see *Gregory v. Schoenel*, *supra*); *Gunby v. Sluter*, (1875) 44 Md. 237. Since in equity the cases proceed on the ground of mutual mistake [*Spurr v. Benedict*, (1868) 99 Mass. 463] there would seem to be no sound objection to adopting the same reasoning in common-law actions involving simply rescission. See *School Directors v. Boomhour*, (1876) 83 Ill. 17; *Woodruff v. Saul*, (1883) 70 Ga. 271 (but see *Barnett v. Speir*, *supra*).

² See also *post*, § 227.

Bannerman v. White, a similar result was reached by the application of a different principle.^a

Lamare, a merchant in French wines, entered into negotiations with Dixon for a lease of cellars. He stated that it was essential to his business that the cellars should be dry, and Dixon assured him, to his satisfaction, that the cellars would be dry. He thereupon made an agreement for a lease, in which there was no term or condition as to the dryness of the cellars. They turned out to be extremely damp. Lamare declined to continue his occupation, and the House of Lords refused to enforce specific performance of the agreement, not because Dixon's statement as to the dryness of the cellars was a term in the contract, but because it was material in obtaining consent and was untrue in fact.

"I quite agree," said Lord Cairns, "that this representation was not a guarantee.^b It was not introduced into the agreement on the face of it, and the result of that is that in all probability Lamare could not sue in a court of law for a breach of any such guarantee or undertaking; and very probably he could not maintain a suit in a court of equity to cancel the agreement on the ground of misrepresentation. At the same time, if the representation was made and if that representation has not been and cannot be fulfilled, it appears to me upon all the authorities that that is a perfectly good defense in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled."^c

Thus it appears, that up to the passing of the Judicature Act the Court of Chancery would refuse specific performance of a contract induced by innocent misrepresentation,¹ and that in transactions of certain kinds it was prepared to set contracts aside on the same grounds. The latter remedy had not by express decision been limited to transactions of the kind I have mentioned, while on the other hand no general rule had been laid down which might apply to all contracts.²

^a *Lamare v. Dixon*, (1873) L.R. 6 H.L. 414.

^b "Guarantee" must be understood here to mean "warranty," and not the contract dealt with in § 97.

^c *Lamare v. Dixon*, *supra*, at p. 428.

¹ *Boynnton v. Hazelboom*, (1867, Mass.) 14 Allen, 107; *Isaacs v. Skrinka*, (1888) 95 Mo. 517.

² Equity will rescind contracts for innocent misrepresentation. *Grossman v. Lewis*, (Mass. 1917) 115 N.E. 236; *Wilcox v. Iowa Wesleyan Univ.*, (1871) 32 Iowa, 367; *Hunter v. French & Co.*, (1896) 96 Iowa, 573; *Brooks v. Hamilton*, (1870) 15 Minn. 26; *Beebe v. Young*, (1866) 14 Mich. 136; *Hammond v. Pennock*, (1874) 61 N.Y. 145; *Carr v. Nat. Bk.*, (1901) 167 N.Y. 375; *Doggett v. Emerson*, (1845, U.S. C.C.) 3 Story, 700. This is sometimes worked out on the ground of mutual mistake. *Spurr v. Benedict*, (1868)

207. Effect of English Judicature Act. The Judicature Act ^a provides that a plaintiff may assert any equitable claim and a defendant set up any equitable defense in any court, and that where the rules of equity and law are at variance, the former shall prevail, and in their treatment of this provision there is no doubt that the courts have extended the application of equitable remedies and altered the character of the common-law rule. Innocent misrepresentation which brings about a contract is now a ground for setting the contract aside, and this rule applies to contracts of every description.^b

The case of *Redgrave v. Hurd* ^c was the first in which this rule was applied. It was a suit for specific performance of a contract to buy a house. Redgrave had induced Hurd to take, with the house, his business as a solicitor, and it was for misstatement as to the value of this business that Hurd resisted specific performance, and set up a counterclaim to have the contract rescinded and damages given him on the ground of deceit practiced by Redgrave. The Court of Appeal held that there was no such deceit, or statement false to Redgrave's knowledge, as would entitle Hurd to damages; but specific performance was refused and the contract rescinded on the ground that defendant had been induced to enter into it by the misrepresentation of the plaintiff.

The law on this subject is thus stated by Jessel, M.R.:

"As regards the rescission of a contract there was no doubt a difference between the rules of courts of equity and the rules of courts of common

^a 36 & 37 Viet. c. 66, § 24, sub-ss. 1, 2, and § 25, sub-a. 11.

^b The Court of Appeal of New Zealand, in *Riddiford v. Warren*, (1901) 20 N.Z. L.R. 572, has taken exception to this statement of the law so far as regards the sale of goods, upon a construction of local statutes identical with the Judicature Act, § 25 (11) and the Sale of Goods Act, § 61 (2). The latter provides that "the rules of the common law, including the law merchant," and in particular the rules relating to the effect of (*inter alia*) misrepresentation shall continue to apply to the sale of goods. It is said that this amounts to a declaration that the common-law rules alone (to the exclusion of those of equity) applied to such contracts up to the passing of this Act and are alone to be considered since the Act. But it is respectfully submitted (1) that no such declaration can properly be implied from the language of the statute; and (2) that the phrase "rules of the common law" must be read subject to the express provisions of the Judicature Act. *Schröder v. Mendl*, (1877) 37 L.T. 452, and *Hindle v. Brown*, (1906) 98 L.T. 44, both seem to show that the sale of goods is in no different position from other contracts.

^c (1881) 20 Ch. D. 1.

99 Mass. 463; *Keene v. Demelman*, (1898) 172 Mass. 17; *Belknap v. Sealey*, (1856) 14 N.Y. 143; *Paine v. Upton*, (1882) 87 N.Y. 327; *Smith v. Bricker*, (1892) 86 Iowa, 285; *Smith v. Richards*, (1839, U.S.) 13 Pet. 26. The statement in *Southern Development Co. v. Silva*, (1888) 125 U.S. 247, that it is necessary to show "that such representation was not actually believed on reasonable grounds to be true," must be regarded as failing to distinguish between the requirements at law and in equity. See *Turner v. Ward*, (1876) 154 U.S. 618.

law — a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of courts of equity it was not necessary, in order to set aside a contract, obtained by material false representation, to prove that the party who obtained it knew at the time that the representation was made that it was false.”^a

In *Newbigging v. Adam*^b the rule thus laid down was adopted as of general application. The plaintiff had been induced to enter into a partnership with one Townend by statements made by the defendants, who were either the principals or concealed partners of Townend. The Court of Appeal held that “there was a substantial misstatement though not made fraudulently, which induced the plaintiff to enter into the contract,” and the contract was set aside. Bowen, L.J., after quoting the passage set forth above from the judgment of Jessel, M.R., endeavors, not altogether effectually, to reconcile the views of common law and equity on the subject of innocent misrepresentation.

“If the mass of authority there is upon the subject were gone through, I think it would be found that there is not so much difference as is generally supposed between the view taken at common law and the view taken in equity as to misrepresentation. At common law it has always been considered that misrepresentations which strike at the root of a contract are sufficient to avoid the contract on the ground explained in *Kennedy v. Panama, New Zealand and Royal Mail Co.*”^c

The case referred to by Bowen, L.J., was one of cross-actions — by a shareholder, to recover calls paid, and by a company, to recover calls due. The shareholder contended that he had been induced to take shares on the faith of a statement in the prospectus, which turned out to be untrue; and that this statement was so vital to the contract that its untruth amounted to a total failure of consideration, and entitled him to be discharged from his liability to calls.

The position of the Court of Queen’s Bench in this case was very similar to that of the Court of Common Pleas in *Bannerman v. White*.^d A court of equity might or might not have set the transaction aside on the ground that consent had been obtained by a material misrepresentation made prior to the contract. A court of common law could only deal with the matter by incorporating the representation with the contract, and then asking whether its untruth amounted to a total failure of consideration or the breach of a condition vital to the contract.

^a *Redgrave v. Hurd*, (1881) 20 Ch. D. 12.
^c (1867) L.R. 2 Q.B. 580.

^b (1896) 34 Ch. D. 582, 592.
^d (1861) 10 C.B. (N.S.) 844.

In *Bannerman v. White* the court held that the representation was a vital condition: in *Kennedy v. Panama Company*^a the court held that it was not a vital condition. Equity would give or withhold the same relief, but upon a different and more intelligible principle. This principle is clearly stated by Lord Bramwell in *Derry v. Peek*,^b speaking of the various rights of one who has been injured by the untruth of statements inducing a contract: "To this may now be added the equitable rule that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission."

208. **Nature of relief given.** Thus a general rule is settled; innocent misrepresentation, if it furnishes a material inducement, is ground for resisting an action for breach of contract or for specific performance, and also for asking to have it set aside; this relief is of general application, and is not peculiar to the contracts described as *uberrimae fidei*.

But relief can only be obtained when the transaction is repudiated at once, and when the parties can be relegated to the position which they occupied before the contract was made. Save in the case of fraud, rescission will not be granted after property has changed hands under a contract, and the party who has been misled must take steps to repudiate the transaction at the earliest possible moment.^{c 1}

"It is well settled that a contract can only be rescinded on the ground of an innocent misrepresentation, if the parties can be put back again in their original position, and it cannot be rescinded if the contract has been so completed that this cannot be done."^d

Rescission of a lease duly executed, the lessee having taken possession of the premises, has been refused on these grounds.^e

The relief given by the court to a person who by an innocent misrepresentation by the other party has been induced to enter into a contract may include an *indemnity* "against the obligations which he has contracted under the contract which is set aside": but it can never as a general rule include damages for loss sustained.^f

^a (1867) L.R. 2 Q.B. 530.

^b (1889) 14 App. Cas. 347.

^c *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326.

^d *Hindle v. Brown*, (1908) 98 L.T. 44, at p. 45.

^e *Angel v. Jay*, [1911] 1 K.B. 666.

^f *Newbigging v. Adam*, (1886) 34 Ch. D. 589.

¹ Rescission has recently been decreed in the United States on the ground of innocent misrepresentation even though the contract had been fully performed by both parties. *Bloomquist v. Farson*, (1918, N.Y.) 118 N.E. 855; *Canadian Agency v. Assets R. Co.*, (1914) 150 N.Y. Supp. 769, 165 App. Div. 96. See comment by Professor Walter W. Cook in 27 *Yale Law Journal*, 929. See also previous notes herein to §§ 196-200, 206.

209. Expression of opinion. But the representation must form a real inducement to the party to whom it is addressed. The mere expression of an opinion which proves to be unfounded will not invalidate a contract. In effecting a policy of marine insurance the insured communicated to the insurers a letter from the master of his vessel stating that in his opinion the anchorage of the place to which the vessel was bound was safe and good. The vessel was lost there: but the court held that the insured, in reading the master's letter to the insurers, communicated to them all that he himself knew of the voyage, and that the letter was not a representation of fact, but of opinion, which the insurers could act upon or not as they pleased.^a ¹

210. Commendatory expressions. Nor are commendatory expressions such as men habitually use in order to induce others to enter into a bargain dealt with as serious representations of fact. A certain latitude is allowed to a man who wants to gain a purchaser, though it must be admitted that the border line of permissible assertion is not always discernible. At a sale by auction land was stated to be "very fertile and improvable:" it was in fact partly abandoned as useless. This was held to be "a mere flourishing description by an auctioneer."^b ² But where in the sale of an hotel the occupier was stated to be "a most desirable tenant," whereas his rent was much in arrear and he went into liquidation directly after the sale, such a statement was held to entitle the purchaser to rescind the contract.^c

211. Damages for innocent misrepresentation. Exceptions. To the rule that no damages can be obtained for innocent misrepresentation there are however three exceptions.

(a) *Warranty of authority.* The first is where an agent in good faith assumes an authority which he does not possess and induces another to deal with him in the belief that he has the authority which he assumes.^d ³ This subject is further discussed in the chapter on Agency.

^a *Anderson v. Pacific Insurance Co.*, (1872) L.R. 7 C.P. 65.

^b *Dimmock v. Hallett*, (1866) 2 Ch. 21.

^c *Smith v. Land & House Property Co.*, (1884) 28 Ch. D. 7.

^d *Collen v. Wright*, (1857) 8 E. & B. 647. This liability was, by the decision in *Collen v. Wright*, applicable to cases in which a contract was brought about by the innocent assumption of a non-existent authority. More recent cases, *Firbank v. Humphreys*, (1886) 18 Q.B.D. 62, and *Starkey v. Bank of England*, [1903] A.C. 114, have extended the liability to every transaction, contractual or otherwise, brought about by such an assumption.

¹ *Fish v. Cleland*, (1864) 33 Ill. 237; *Southern Development Co. v. Silva*, (1888) 125 U.S. 247; *Akin v. Kellogg*, (1890) 119 N.Y. 441.

² *Deming v. Darling*, (1889) 148 Mass. 504 [but see *Crane v. Elder*, (1892) 48 Kans. 259]; *Chrysler v. Canaday*, (1882) 90 N.Y. 272.

³ Where the agent has knowledge of his want of authority he is liable in

(b) *Statutory.* The Companies (Consolidation) Act, 1908,^a requires that a prospectus of a company should contain a number of particulars which must be assumed to be material to the formation of the judgment of an intending applicant for an allotment of shares. The duty cast by the statute upon those interested in the formation of the company would seem to create a corresponding liability to an action for damages.

(c) The same Act^b (re-enacting the provisions of the Directors Liability Act,^c 1890) also gives a right to any person who has been induced to subscribe for shares in a company by untrue statements in a prospectus, to obtain compensation from the directors for loss sustained, unless they can show that they had reasonable ground to believe the statement and continued to believe it till the shares were allotted, or that the statement was a fair account of the report of an expert or a correct representation of an official document.

212. *Estoppel.* From these cases we must carefully distinguish the sort of liability which is supported rather than created by *estoppel*.

Estoppel is a rule of evidence,¹ and the rule may be stated in the words of Lord Denman:

"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act

^a 8 Edw. VII, c. 69, § 81.

^b 8 Edw. VII, c. 69, § 83.

^c 53 & 54 Vict. c. 64.

tort for deceit, although he does not intend to defraud. *Kroeger v. Pitcairn*, (1882) 101 Pa. 311; *Noyes v. Loring*, (1867) 55 Me. 408.

An action against an agent for an innocent misrepresentation by words or conduct as to his authority, is, in effect, though not always in form, an exception to the general rule that an action for damages will not lie for an innocent misrepresentation. In order to avoid the recognition of the exception, the courts invent the fiction of an "implied warranty of authority" and allow an action for the breach of this warranty. *Kroeger v. Pitcairn*, *supra*; *White v. Madison*, (1862) 26 N.Y. 117; *Baltzen v. Nicolay*, (1873) 53 N.Y. 467; *Seeberger v. McCormick*, (1899) 178 Ill. 404; *Huffcut on Agency*, § 183.

¹ It is most misleading to call estoppel a rule of evidence, and there is no sufficient reason for distinguishing the liability in these cases from those that precede. To say that one who has made representations is estopped to deny them is to lay down a substantive rule of law that such representations create a legal duty to pay loss that may be caused thereby. These representations are therefore operative facts, causing the same legal relations as in the other cases explained above. This liability based upon an "estoppel" is merely an example of how the courts, by the use of a *fiction* or of a term of art that forecloses thought, evade and limit the application of an inconvenient or unjust rule such as that in *Derry v. Peek*, (1889) 14 App. Cas. 337. See *post*, § 227; Williston, 24 *Harvard Law Review*, 423-27.

on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *

Where a defendant is by a rule of evidence not permitted to disprove certain facts, and where on the assumption that such facts exist the plaintiff would have a right, then estoppel comes in aid of the establishment of the right by preventing the denial or disproof of these facts.

But an estoppel can only arise from words or conduct which are clear and unambiguous. This rule, and the effect of estoppel, may be illustrated by the case of *Low v. Bouverie*.^b

Low was about to lend money to X on the security of X's share of a trust fund, of which Bouverie was trustee. He asked Bouverie whether this share was mortgaged or otherwise encumbered, and if so to what extent. Bouverie named such charges as occurred to him, but did not name all, and the loan was made. In fact the interest of X was heavily encumbered, and when Low sued Bouverie, X was an undischarged bankrupt. Low claimed that Bouverie, the trustee, was bound to make good the loss. The Court of Appeal held (1) that Bouverie's statement could not be construed as a warranty, so as to bind him by contract to Low; (2) that the statement was not false to his knowledge; (3) that the misrepresentation, being innocent, could not give rise to an action for damages, unless a duty was cast upon Bouverie to use care in statement; ^c (4) that no such duty rested upon a trustee, requiring him to answer questions concerning the trust fund to strangers about to deal with the *cestui que trust*; (5) that therefore Bouverie could only be held liable if he was *estopped* from contending that there were other incumbrances upon the trust fund than those which he had mentioned to Low.

If he had been so estopped he might have been ordered to pay

^a *Pickard v. Sears*, (1837) 6 A. & E. 469.

^b [1891] 3 Ch. (C.A.) 82.

^c The mention of this duty would seem to be an excess of judicial caution, for it is hard to see how such a duty could arise so as to give a right of action for negligent, as distinct from fraudulent, misrepresentation. Such a liability may exist in the case of employer and employed, where the person employed acquires and gives information on which the employer will act. But a failure to use due care in the supply of such information would be a breach of the contract of employment, creating a liability *ex contractu* not *ex delicto*. In cases turning on negligent statement, the duty, since *Derry v. Peek*, (1889) 14 App. Cas. 347, has been held, in each case, not to exist, and it is probably, apart from contract, altogether non-existent. See *Angus v. Clifford*, [1891] 3 Ch. 449, and *Le Lievre v. Gould*, [1893] 1 Q.B. 491.*

* But negligence may be the true ground upon which many American cases are to be explained. See *ante*, § 200, note. To hold that B is estopped to deny his statements when he is sued is to hold that it is now his duty to make good the loss caused by them.

to Low the trust fund, subject only to the incumbrances disclosed in his letters; and, as there were other charges in abundance, he would have had to make good the deficiency out of his own pocket. But the court held that the letters upon which Low sought to make Bouverie liable could not be construed as explicitly limiting the charges on the trust fund to those specified in the letters. "An estoppel," said Bowen, L.J., "that is to say, the language on which the estoppel is founded, must be precise and unambiguous."¹

Instances of such precise and unambiguous statement may be found in the cases of companies which issue certificates stating that the holders are entitled to shares, or to "fully paid up" shares. If the certificate is obtained by means of a deposit with the company of a forged transfer of shares, the company are nevertheless estopped from disputing the title to shares which their certificates confer.²

(4) *Non-disclosure of material fact. Contracts uberrimae fidei*

213. **Contracts affected by non-disclosure.** There are some contracts in which more is required than the absence of innocent misrepresentation or fraud. These are contracts in which one of the parties is presumed to have means of knowledge which are not accessible to the other, and is therefore bound to tell him everything which may be supposed likely to affect his judgment. In other words, every contract may be invalidated by material misrepresentation, and some contracts even by non-disclosure of a material fact.

Contracts of marine, fire, and life insurance (and indeed, it would seem, contracts of insurance of every kind),³ contracts for the sale of land, for family settlements, and for the allotment of shares in companies, are of the special class affected by non-disclosure. To these are sometimes added, in my opinion erroneously, contracts of suretyship and partnership.

214. **Contracts of marine insurance.**³ The common-law rules

^a *Bloomenthal v. Ford*, [1897] A.C. 156; *Balkis Co. v. Tomkinson*, [1898] A.C. 396.

^b *Seaton v. Heath*, [1899] 1 Q.B. 782. The decision of the Court of Appeal in this case was afterwards reversed by the House of Lords, [1900] A.C. 138, on a question of fact as to the materiality of the concealment; but the view expressed by the Court of Appeal that contracts for insurance of all kinds are within the rule was not dissented from.

¹ See *Stevens v. Ludlum*, (1891) 46 Minn. 160; *Ricketts v. Scothorn*, (1898) 57 Neb. 51; *Denver Fire Ins. Co. v. McClelland*, (1885) 9 Colo. 11; *Freeman v. Freeman*, (1870) 43 N.Y. 34.

² See *Cook on Corp.* §§ 365-370.

³ "Every fact and circumstance which can possibly influence the mind

upon this subject are now codified in the Marine Insurance Act of 1906.^a Section 18 of the Act provides that:

(1) The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.¹ If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.

In *Ionides v. Pender* goods were insured upon a voyage for an amount largely in excess of their value; it was held that although the fact of over-valuation would not affect the risks of the voyage, yet, being a fact which underwriters were in the habit of taking into consideration, its concealment vitiated the policy.

"It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy."^b

It will be observed that under the Act the assured is, for purposes of communication, "deemed to know" all circumstances which in the ordinary course of business he ought to know;^c and the same rule applies to an agent effecting an insurance for a principal. The agent must disclose everything material that he himself knows or is "deemed to know," as well as everything that his principal is bound to disclose, unless it comes to the knowledge of the principal too late for him to inform the agent.

215. **Contracts of fire insurance.** The description of the premises appears to form a representation on the truth of which the validity of the contract depends. American authorities go further than this, and hold that the innocent non-disclosure of any material facts vitiates the policy. In an American case,^d referred

^a 6 Edw. VII, c. 41 §§ 17-21.

^b Per Blackburn, J., in *Ionides v. Pender*, (1874) L.R. 9 Q.B. 537.

^c 6 Edw. VII, c. 41 § 19.

^d New York Bowery Fire Insurance Co. v. New York Fire Insurance Co., (1837 N.Y.) 17 Wend. 359.

of the insurer, in determining whether he will underwrite the policy, or at what premium, is material to be disclosed, and a concealment thereof will vitiate the policy." *Ely v. Hallett*, (1804, N.Y.) 2 Caines, 57; *Lewis v. Eagle Ins. Co.*, (1858, Mass.) 10 Gray, 508; *Hart v. British Ins. Co.*, (1839) 80 Cal. 440; *Rosenheim v. Ins. Co.*, (1862) 33 Mo. 230; *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, (1882) 107 U.S. 485. For relation of salvor and saved on the high seas, see *The Clandebove*, (1895) 70 Fed. 631.

¹ See *Insurance Co. v. Ruggles*, (1827, U.S.) 12 Wheat. 408.

to by Blackburn, J., in the judgment above cited, "the plaintiffs had insured certain property against fire, and the president of the company heard that the person insuring with them, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured. The plaintiffs reinsured with the defendants, but did not inform them of this. A fire did take place, the insured came upon the plaintiffs, who came upon the defendants. The judge directed the jury, that if this information given to the president of the plaintiff company was intentionally kept back, it would vitiate the policy of reinsurance. The jury found for the plaintiffs, but the court, on appeal, directed a new trial on the ground that the concealment was of a material fact, and whether intentional or not, it vitiated the insurance." ^{a 1}

216. **Contracts of life insurance.** In *The London Assurance v. Mansel* ^b an action was brought to set aside a policy of life insurance on the ground that material facts had been concealed by the party effecting the insurance. He had been asked and had answered questions as follow:

Has a proposal ever been made
on your life at other offices? If so,
where?

Was it accepted at the ordinary
premium or at an increased pre-
mium or declined?

Insured now in two offices for
£16,000 at ordinary rates. Policies
effected last year.

The answer was true so far as it went, but the defendant had endeavored to increase his insurance at one of the offices at which he was already insured, and to effect further insurances at other offices, and in all these cases he had been refused.

The contract was set aside, and Jessel, M.R., thus laid down the general principle on which his decision was founded.

"I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it

^a (1874) L.R. 9 Q.B. 538.

^b (1879) 11 Ch. D. 363.

¹ *Walden v. Louisiana Ins. Co.*, (1838) 12 La. 134 (non-disclosure); *Goddard v. Monitor Ins. Co.*, (1871) 108 Mass. 56 (innocent misrepresentation). But the doctrine as to non-disclosure does not go so far in fire insurance as in marine insurance. *Burritt v. Ins. Co.*, (1843, N.Y.) 5 Hill, 188; *Hartford Prot. Ins. Co. v. Harmer*, (1853) 2 Ohio St. 452; *Clark v. Ins. Co.*, (1850, U.S.) 8 How. 235. The insurer may be charged with notice of what he could reasonably discover by inquiry or examination. *Continental Ins. Co. v. Kasey*, (1874, Va.) 25 Gratt. 268; *Insurance Co. v. Leslie*, (1890) 47 Ohio St. 409; *Short v. Home Ins. Co.*, (1882) 90 N.Y. 16.

is life, or fire, or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances, from the peculiar nature of marine insurance, which require to be disclosed and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle."¹

But where *A* is effecting an insurance on the life of *X*, and *X* makes false statements as to his life and habits which *A* in good faith passes on to the insurance office, such statements have been held not to vitiate a policy. The ground of the decision was (1) that the statements were not *conditions* on the truth of which the validity of the contract depended, and (2) that *X* was not the agent of *A* for the purpose of effecting the policy, so that the fraud of *X* was not imputable to *A* under the rule that the principal is liable for the fraud of his agent.²

It is possible that if such a case were to occur since equitable remedies for misrepresentation have become general it might be decided otherwise. It precisely corresponds to the case described in *Redgrave v. Hurd*:³ "where a man having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract."

But in a later case⁴ Vaughan Williams, L.J., expressed his approval of the view taken by Lord Campbell in *Wheelton v. Hardisty*, that where the assured "does his best to put the insurer in a situation to obtain the information and to form his own opinion that the information is sincere," the policy cannot be avoided by the insurer, if no blame is imputable to the assured himself with regard to the information given.

217. Contracts for the sale of land. In agreements of this na-

^a *London Assurance Co. v. Mansel*, (1879) 11 Ch. D. 367.

^b *Wheelton v. Hardisty*, (1857) 8 E. & B. 298.

^c (1881) 20 Ch. D. 1.

^d *Joel v. Law Union*, [1906] 2 K.B. 879.

¹ In a somewhat similar case where there were four interrogatories printed under one number, and the insured answered one of them correctly but did not answer the other three, the Supreme Court of the United States held that by issuing the policy the insurer waived the answers to the other three, distinguishing the case cited by the author, and criticising some portions of that decision. *Phoenix Life Ins. Co. v. Raddin*, (1887) 120 U.S. 183. And see *Mallory v. Ins. Co.*, (1871) 47 N.Y. 52. But if there be a misrepresentation, however innocent, it avoids the policy, where by the terms of the policy the answers are made material. *Cushman v. Ins. Co.*, (1875) 63 N.Y. 404; *Clemans v. Supreme Assembly &c.*, (1892) 131 N.Y. 485; *McCoy v. Metropolitan Ins. Co.*, (1882) 133 Mass. 82; *New York Life Ins. Co. v. Fletcher*, (1896) 117 U.S. 519. Cf. *Gray v. National Benefit Assoc.*, (1887) 111 Ind. 531.

² *Penn Ins. Co. v. Bank*, (1896) 72 Fed. 413.

ture a misdescription of the premises sold or of the terms to which they are subject, though made without any fraudulent intention, will vitiate the contract. In *Flight v. Booth*,^a leasehold property was agreed to be purchased by the defendant. The lease contained restrictions against the carrying on of several trades, of which the particulars of sale mentioned only a few. Tindal, C.J., held that the plaintiff could rescind the contract and recover back money paid by way of deposit on the purchase of the property.

"We think it is a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale."¹

Molyneux v. Hawtreys^b is also a case of non-disclosure. A lease was sold by plaintiff to defendant containing onerous and unusual covenants. The vendor had not disclosed these covenants nor given to the purchaser a reasonable opportunity for informing himself of them; and the contract could not be enforced.²

Equitable remedies however can be adapted to the extent and character of the misdescription;^c and if this is merely a matter of detail the purchaser may be compelled to conclude the sale subject to compensation to be made by the vendor.^{d 3}

The parties may also provide in the contract of sale for compensation in case of misdescription, and this right, if so expressed, will not merge in the deed of conveyance but may be exercised after the property has passed.^e

^a (1834) 1 Bing. N.C. 370.

^b [1908] 2 K.B. 487.

^c Pollock (7th ed.), 537-42.

^d *In re Fawcett & Holmes*, (1889) 42 Ch. D. 156.

^e *Palmer v. Johnson*, (1884) 13 Q.B.D. (C.A.) 351.

¹ The American cases are fully in accord upon the effect of a misdescription. *Rayner v. Wilson*, (1875) 43 Md. 440; *Stevens v. Giddings*, (1878) 45 Conn. 507; *King v. Knapp*, (1875) 59 N.Y. 462. But, as stated in the principal case, this is rather because the purchaser does not get what he bargains for, than because the contract is *uberrimae fidei*.

² *Murphin v. Scovell*, (1889) 41 Minn. 262; *McClure v. Trust Co.*, (1900) 165 N.Y. 108.

³ *King v. Bardeau*, (1822, N.Y.) 6 Johns. Ch. 38; *Smyth v. Sturges*, (1838) 108 N.Y. 495; *Towner v. Tickner*, (1885) 112 Ill. 217. The buyer may insist on performance with compensation for defects. *Bogan v. Daughdrill*, (1874) 51 Ala. 312; *Napier v. Darlington*, (1871) 70 Pa. 64; *Lancaster v. Roberts*, (1893) 144 Ill. 213.

Contracts preliminary to family settlements need no special illustration.

218. **Contracts for the purchase of shares in companies.** The rule as to the fullness of statement required of projectors of an undertaking in which they invite the public to join is clearly stated by Kindersley, V.C., in the case of the *New Brunswick Railway Company v. Muggeridge*,^a in words which were approved by Lord Chelmsford in a later case in the house of Lords:^b

"Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."^c

In another case Lord Cairns points out the distinction between fraud and such innocent misrepresentation as makes a contract of this nature voidable. He intimates that mere non-disclosure can never amount to fraud unless accompanied with such substantial representations as give a false air to facts, but that "it might be a ground in a proper proceeding and at a proper time for *setting aside an allotment or purchase of shares*."^e

We should distinguish this right of avoidance for non-disclosure, (a) from the remedy in deceit for actual fraud; (b) from the remedy in tort apparently given by § 81 of the Companies (Consolidation) Act, 1908^d (re-enacting a section of an earlier Act to the same effect) against persons responsible for the issue of a prospectus from which material facts are omitted, to those who suffer pecuniary loss by such omissions; and (c) from the right to compensation given by § 83 of the same Act (re-enacting the provisions of the Directors Liability Act, 1890),^e to persons who have sustained loss by purchasing shares on the faith of an untrue statement in the prospectus of a company.

^a (1860) 1 Dr. & Sm. at p. 381.

^b *Venezuela Ry. Co. v. Kisch*, (1867) L.R. 2 H.L. 113.

^c *Peck v. Gurney*, (1873) L.R. 6 H.L. 403. ^d 8 Edw. VII, c. 69. ^e 53 & 54 Vict. c. 64.

¹ It is held here that the relation of the promoters to those who are induced by them to take stock is one of trust and confidence, and that stockholders may rescind or may recover damages for the failure of the promoters to disclose all material facts. *Brewster v. Hatch*, (1890) 122 N.Y. 349; *Bosley v. National Machine Co.*, (1890) 123 N.Y. 550; *Upton v. Tribilcock*, (1875) 91 U.S. 45; *Wiser v. Lawler*, (1903) 189 U.S. 260.

219. Suretyship and partnership. Suretyship and partnership are sometimes described as contracts which need a full disclosure of all facts likely to affect the judgment of the intending surety or partner.

There seems no authority^a for this view; either contract would be invalidated by material though innocent misrepresentation, or *by such non-disclosure of a fact as would amount to an implied representation that the fact did not exist*; but neither requires the same fullness of disclosure which is necessary to the contract to sell land or to allot shares.^b The intending surety or partner cannot claim the protection accorded to the intending insurer, investor or buyer of land.¹ The confusion which has sometimes arisen between the two classes of cases may perhaps be partly due to the fact that the line is not always easy to draw in practice between contracts of suretyship, in the strict sense promises to answer for the debt, default or miscarriage of another, and contracts of insurance, promises to indemnify against the risk of another's dishonesty.

But though the contract between surety and creditor "is one in which there is no universal obligation to make disclosure,"^c yet when once the contract has been made, the surety is entitled to be informed of any agreement which alters the relation of creditor and debtor, or any circumstance which might give him a power to avoid the contract. So in *Phillips v. Foxall*^d the defendant had guaranteed the honesty of a servant in the employ of the plaintiff, the servant was guilty of dishonesty in the

^a The only authorities cited in Lindley on Partnership, p. 342 (7th ed.), are *Hichens v. Congreve*, (1828), 1 R. & M. 150, and *Fawcett v. Whitehouse*, (Ib. 132); but both are cases of actual fraud.

^b *Lee v. Jones*, (1864) 17 C.B. (N.S.) 482; *L.G.O. Co. v. Holloway*, [1912] 2 K.B. 72.

^c *Davies v. London Ins. Co.*, (1878) 8 Ch. D. 475. See the curious case of *Seaton v. Heath*, [1899] 1 Q.B. 782, which was one of an insurance of a guarantee; the decision in the House of Lords, [1900] A.C. 135, turned on a question of fact, but the judgment of *Romer, L.J.*, in the Court of Appeal marks very clearly the distinction between insurance and suretyship: the first is and the second is not *uberrimae fidei*. The subject is also discussed at length in *L.G.O. Co. v. Holloway*, [1912] 2 K.B. 72.

^d (1872) L.R. 7 Q.B. 666.

¹ "The rule which prevails in contracts of marine insurance that all material circumstances known to the assured must be disclosed, and that the omission to do so avoids the policy, though the concealment is not fraudulent, does not apply to an ordinary guaranty." *Howe Machine Co. v. Farrington*, (1880) 82 N.Y. 121, 126. See also *Magee v. Manhattan Co.*, (1875) 92 U.S. 93; *Atlas Bank v. Brownell*, (1869) 9 R.I. 168. But if one takes a bond guaranteeing the fidelity of an employee and conceals the fact of a prior defalcation of such employee, the surety may avoid the bond. *Sooy v. New Jersey*, (1877) 39 N.J. L. 135; *Wilson v. Monticello*, (1882) 85 Ind. 10; *Bank v. Anderson*, (1885) 65 Iowa, 692; *Traders' Co. v. Herber*, (1897) 67 Minn. 106; *Smith v. Josselyn*, (1884) 40 Ohio St. 409.

course of his service, but the plaintiff continued to employ him and did not inform the defendant of what had occurred. Subsequently the servant committed further acts of dishonesty. The plaintiff required the defendant to make good the loss. It was held that the defendant was not liable. The concealment released the surety from liability for the subsequent loss.¹ It would seem that if the surety knew that the servant had committed acts of dishonesty which would justify his dismissal, he would be entitled to withdraw his guarantee.²

And so with partnership. The relation of partners *inter se* is that of principal and agent, so that one partner can bind the firm in transactions concerning the partnership. Thus, when the contract of partnership has been formed, each partner is bound to disclose to the others all material facts, and to exercise the utmost good faith in all that relates to their common business.³

III. WILFUL MISREPRESENTATION, OR FRAUD

220. **Meaning of fraud: essential features.** Fraud is an actionable wrong. As such it is susceptible of fairly precise definition; and as such I treat of it here. Fraud which gives rise to the action of deceit is a very different thing from the sharp practice or unhandsome dealing which would incline a court of equity to refuse the discretionary remedy of specific performance, or to grant relief by the cancellation of a contract. It represents the reasoned, logical conclusions of the common-law courts as to the nature of the deceit which makes a man liable in damages to the injured party.

Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.⁴

Let us consider these characteristics in detail.

¹ *Burgess v. Eve*, (1872) 13 Eq. 450.

² *Saint v. Wheeler & Co.*, (1891) 95 Ala. 362; *Rapp v. Phoenix Co.*, (1885) 113 Ill. 390; *Roberts v. Donovan*, (1886) 70 Cal. 108. But a mere default not indicating dishonesty need not be communicated. *Atlantic & Co. v. Barnes*, (1876) 64 N.Y. 335; *Watertown & Co. v. Simmons*, (1881) 131 Mass. 85.

³ Partners and agents must disclose all material facts. *Caldwell v. Davis*, (1887) 10 Colo. 481; *Hanley v. Sweeney*, (1901) 109 Fed. 712; *Hegenmeyer v. Marks*, (1887) 37 Minn. 6; *Holmes v. Cathcart*, (1903) 88 Minn. 213; as to fiduciaries generally, see *Dambmann v. Schulting*, (1878) 75 N.Y. 55.

⁴ "The essential elements of an action for false pretenses are representations, falsity, scienter, deception and injury." *Hotchkiss v. Bank*, (1891) 127 N.Y. 329, 337. See *Southern Dev. Co. v. Silva*, (1888) 125 U.S. 247. See 18 Am. St. Rep. 555, note.

(1) *Essential features of fraud*

221. **A false representation.** Fraud is a false representation.

It differs here from *non-disclosure* such as may vitiate a contract *uberrimae fidei*; there must be an active attempt to deceive either by a statement which is false, or by a statement not untrue in itself but accompanied with such a suppression of facts as to convey a misleading impression. Concealment of this kind is sometimes called "active," "aggressive," or "industrious"; but perhaps the word itself, as opposed to non-disclosure, suggests the active element of deceit which constitutes fraudulent misrepresentation. The distinction between misrepresentation by non-disclosure, which can only affect contracts *uberrimae fidei*, and misrepresentation which gives rise to an action of deceit, is clearly pointed out by Lord Cairns in the case of *Peek v. Gurney*.^a

"Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for *setting aside an allotment or a purchase of shares*, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as *that the withholding of that which is not stated makes that which is stated absolutely false*."¹

Caveat emptor is the ordinary rule in contract. A vendor is under no duty to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist.²

^a (1873) L.R. 6 H.L. 403.

¹ The American courts recognize three distinct classes of cases under this head: (1) Cases where there is an actual false representation; (2) Where there is active or artful concealment, as in *Croyle v. Moses*, (1879) 90 Pa. 250, and *Kenner v. Harding*, (1877) 85 Ill. 264; (3) Where there is a suppression of truth amounting to a suggestion of falsehood, as explained in *Stewart v. Wyoming Range Co.*, (1888) 128 U.S. 383, and illustrated in the following cases: *The Clandeboye*, (1895) 70 Fed. 631; *Maynard v. Maynard*, (1877) 49 Vt. 297; *Brown v. Montgomery*, (1859) 20 N.Y. 287; *Atwood v. Chapman*, (1877) 68 Me. 38; *Grigsby v. Stapleton*, (1887) 94 Mo. 423. It is admitted that the limits of the third class of cases are not clearly defined, and there is much conflict in the application of the doctrine. *Graham v. Meyer*, (1885) 99 N.Y. 611. As to the duty to disclose extrinsic facts affecting the transaction, see *Laidlaw v. Organ*, (1817) 2 Wheat. 178, and the criticism in *Lapish v. Wells*, (1829) 6 Me. 175, 189, and *Paddock v. Strobbridge* (1857) 29 Vt. 470.

² *Beninger v. Corwin*, (1854) 24 N.J. L. 257, goes to the verge of this doctrine. Its older content represents a declining stage of customary morality.

Hobbs sent to a public market pigs which were to his knowledge suffering from typhoid fever; to send them to market in this state was a breach of a penal statute.^a Ward bought the pigs, "with all faults," no representation being made as to their condition. The greater number died: other pigs belonging to Ward were also infected, and so were the stubblefields in which they were turned out to run. It was contended that the exposure of the pigs in the market amounted to a representation, under the circumstances, that they were free of any contagious disease.^b The case went up to the House of Lords, where Lord Selborne thus states the law on this point: "^c

"Upon the question of implied representation I have never felt any doubt. Such an implication should never be made without facts to warrant it, and here I find none except that in sending for sale (though not in selling) these animals a penal statute was violated. To say that every man is always to be taken to represent in his dealings with other men, that he is not, to his knowledge, violating any statute, is a refinement which (except for the purpose of producing some particular consequence) would not, I think, appear reasonable to any man."^d

In *Keates v. Lord Cadogan*,^e the plaintiff sued for damages arising from the defendant's fraud in letting to the plaintiff a house "which he knew to be required for immediate occupation, without disclosing that it was in a ruinous condition. It was held that no such action would lie.

"It is not pretended," said Jervis, C.J., "that there was any warranty, expressed or implied, that the house was fit for immediate occupation: but, it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an

^a 32 & 33 Vict. c. 70, § 57.

^b *Ward v. Hobbs*, (1877) 3 Q.B.D. (C.A.) 150.

^c (1878) 4 App. Cas. 13.

^d (1851) 10 C.B. 501.

^e The house was leased for a term of years. The law is otherwise where a furnished house is hired for a short period, as for instance the London season. In such a case immediate occupation is of the essence of the contract, and if the house is uninhabitable the lessee is discharged, not on the ground of fraud, but because "he is offered something substantially different from that which was contracted for." *Wilson v. Finch-Hatton*, (1877) 2 Ex. D. 326. This undertaking as to sanitary condition is extended by the Housing of the Working Classes Act, 1890, and by the Housing and Town Planning Act, 1909, to small tenements of a specified value. 53 & 54 Vict. c. 70, § 75; 9 Edw. VII, c. 44, § 14.

Its newer and more limited content must be sought in the later cases at both law and equity. Its content grows less as the content of the rules concerning fraud and innocent misrepresentation grows greater. See §§ 196-99, 223, 227, 229.

¹ But see *Paddock v. Strobbridge*, (1857) 29 Vt. 470; *Stevens v. Fuller*, (1837) 8 N.H. 463; *Grigsby v. Stapleton*, *supra*. A buyer is not bound to disclose facts known to him which increase the value of the seller's property. *Laidlaw v. Organ*, *supra*; *Harris v. Tyson* (1855) 24 Pa. 347; *Neill v. Shamburg*, (1893) 158 Pa. 263.

unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do, what any man in his senses would do, viz., make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit."¹

222. A representation of fact. The representation must be a representation of fact.

Opinion. A mere expression of opinion, which turns out to be unfounded, will not invalidate a contract. There is a wide difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it. The first is an opinion which the buyer may adopt if he will;² the second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.³

Promissory statements. Again, we must distinguish a representation that a thing is from a promise that a thing shall be: neither a statement of intention nor a promise can be regarded as a statement of fact except in so far as a man may knowingly misrepresent the state of his own mind.^b Thus there is a distinction between a promise which the promisor intends to perform, and one which the promisor intends to break. In the first case he represents truly enough his intention that something shall take place in the future: in the second case he misrepresents his existing intention; he not only makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be something other than it really is. Thus it has been laid down

^a *Harvey v. Young*, (1603) 1 Yelv. 20; *Lindsay Petroleum Co. v. Hurd*, (1874) L.R. 5 P.C. at p. 243.

^b *Burrell's case*, (1876) 1 Ch. D. 552.

¹ But the landlord is bound to disclose hidden defects known to him that imperil life or safety. *Cesar v. Karutz*, (1875) 60 N.Y. 229; *Steeffel v. Rothschild*, (1904) 179 N.Y. 273; *Kern v. Myll*, (1890) 80 Mich. 525; *Moore v. Parker*, (1901) 63 Kans. 52; *O'Malley v. Associates*, (1901) 178 Mass. 555.

² Statements of value are generally non-actionable. *Ellis v. Andrews*, (1874) 56 N.Y. 83; *Gordon v. Butler*, (1881) 105 U.S. 553. But may become actionable if accompanied by artifice to induce buyer to forego further inquiry. *Chrysler v. Canaday*, (1882) 90 N.Y. 272; *Simar v. Canaday*, (1873) 53 N.Y. 298; *Coulter v. Clark*, (1903) 160 Ind. 311.

³ *Accord*: *Fairchild v. McMahon*, (1893) 139 N.Y. 290; *Stoney Creek Co. v. Smalley*, (1896) 111 Mich. 321; *Dorr v. Cory*, (1899) 108 Iowa, 725. But many courts hold that a representation by the vendor as to a former price paid by him, is non-actionable. *Holbrook v. Connor*, (1872) 60 Me. 578; *Way v. Ryther*, (1896) 165 Mass. 226 [but see *Medbury v. Watson*, (1843, Mass.) 6 Met. 246]; *Tuck v. Downing*, (1875) 76 Ill. 71.

that if a man buy goods, not intending to pay for them, he makes a fraudulent misrepresentation.^{a 1}

Law. Again, it is said that wilful misrepresentation of law does not give rise to the action of deceit, nor even make a contract voidable as against the person making the statement. There is little direct authority upon the subject, but it may be submitted that the distinction drawn in *Cooper v. Phibbs*^b between ignorance of general rules of law and ignorance of the existence of a right would apply to the case of a fraudulent misrepresentation of law, and that if a man's rights were concealed or misstated knowingly, he might sue the person who made the statement for deceit. A decided opinion has been expressed in the King's Bench Division, that a fraudulent representation of the effect of a deed can be relied upon as a defense in an action upon the deed.^{c 2}

^a *Ex parte Whittaker*, (1875) 10 Ch. 446.

^b (1867) L.R. 2 H.L. 170.

^c *Hirschfield v. London, Brighton and South Coast Railway Co.*, (1876) 2 Q.B.D. 1

¹ Promissory statements are generally non-actionable. *Dawe v. Morris*, (1880) 149 Mass. 188; *Sheldon v. Davidson*, (1893) 85 Wis. 138; *Long v. Woodman*, (1870) 58 Me. 49. But see *McCready v. Phillips*, (1898) 56 Neb. 446; *Hedin v. Minneapolis &c. Inst.*, (1895) 62 Minn. 146, 8 C. 35 L.R.A. 417 and note; *Crowley v. Langdon*, (1901) 127 Mich. 51. An insolvent purchasing goods not intending to pay for them and concealing his insolvency, is guilty of fraud; but not if he intends to pay for them. *Talcott v. Henderson*, (1877) 31 Ohio St. 162; *Devoe v. Brandt*, (1873) 53 N.Y. 462; *Hotchkiss v. Third N. Bk.*, (1891) 127 N.Y. 329; *Brower v. Goodyer*, (1883) 88 Ind. 572; *Jordon v. Osgood*, (1872) 109 Mass. 457; *Watson v. Silsby*, (1896) 166 Mass. 57; *Deere v. Morgan*, (1901) 114 Iowa, 287.

² A misrepresentation of law is not generally actionable, or in any way remediable, because it is the statement of an opinion, or, at least, it should ordinarily be so understood by the reasonable man. *Fish v. Cleland*, (1864) 33 Ill. 237; *Duffany v. Ferguson*, (1876) 66 N.Y. 482; *Ins. Co. v. Brehm*, (1883) 88 Ind. 578; *Jaggar v. Winslow*, (1883) 30 Min. 263; *Upton v. Tribilcock*, (1875) 91 U.S. 45; *Sturm v. Boker*, (1893) 150 U.S. 312. This general rule is subject to some qualifications. (1) If the parties stand in a fiduciary or confidential relation, a misrepresentation of law may be fraudulent. *Sims v. Ferrill*, (1872) 45 Ga. 585. (2) If, although the parties do not stand in a fiduciary relation, the one making the representation has such superior means of knowledge that the one deceived may reasonably rely upon the representation, some courts hold that a misrepresentation of law by which an unconscionable advantage is obtained is fraudulent. *Westervelt v. Demarest*, (1884) 46 N.J. L. 37; *Moreland v. Atchison*, (1857) 19 Tex. 303; *Cooke v. Nathan*, (1853, N.Y.) 16 Barb. 342; *Berry v. Ins. Co.*, (1892) 132 N.Y. 49; *Titus v. Ins. Co.*, (1895) 97 Ky. 567 (but see *Ins. Co. v. Brehm*, *supra*). This doctrine is not susceptible of accurate definition and must be cautiously applied. (3) If the representation, although involving a matter of law, can be resolved into a representation of fact, it will be treated as a representation of fact instead of law; such are cases of representations as to private rights. *Ross v. Drinkard's Adm'r*, (1860) 35 Ala. 434; *Burns v. Lane*, (1885) 138 Mass. 350; *Motherway v. Wall*, (1897) 168 Mass. 333.

223. Knowledge of falsity. The representation must be made *with knowledge of its falsehood or without belief in its truth.*

Mistake or negligence. Unless this is so, a representation which is false gives no right of action to the party injured by it. A telegraph company, by a mistake in the transmission of a message, caused the plaintiff to ship to England large quantities of barley which were not required; and this, owing to a fall in the market, resulted in a heavy loss. It was held that the representation, not being false to the knowledge of the company, gave no right of action to the plaintiff.¹

"The general rule of law," said Bramwell, L.J., "is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it."*

This rule is to be supplemented by the words of Lord Herschell in *Derry v. Peek*.^b

"First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states."

Therefore if a man makes a false statement, honestly believing it to be true, he cannot be rendered liable in an action of deceit.²

* *Dickson v. Reuter's Telegraph Co.*, (1877) 3 C.P.D. 1, 5
 b (1889) 14 App. Cas. p. 374.

(4) A representation as to a foreign law is a representation of fact. *Bethell v. Bethell*, (1883) 92 Ind. 318; *Wood v. Roeder*, (1897) 50 Neb. 476 [but see *Mutual Life Ins. Co. v. Phinney*, (1900) 178 U.S. 327, 341].

¹ The result in the United States is otherwise, though not on the ground of deceit. In this country the one to whom a telegraph message is addressed may generally maintain an action for damages for negligence, although he is not a party to the contract. "While it may be difficult to reply to the criticisms of the grounds upon which the American decisions rest, it must be regarded as settled by an almost unbroken current, that the telegraph company is under responsibility to the sendee, at least in those cases in which injury results from the delivery of an altered message." *Western Union Telegraph Co. v. Allen*, (1889) 66 Miss. 549; *New York & C. Co. v. Dryburg*, (1860) 35 Pa. 298; *Pearsall v. Western Union Tel. Co.*, (1891) 124 N.Y. 256. See *Russell v. W. U. Tel. Co.*, (1896) 57 Kans. 230; *Western Union Tel. Co. v. Norris*, (1901) 25 Tex. Civ. App. 43.

² Some American courts confine actions for deceit to cases where the defendant either knew that his statement was false or knew that he did

Representation of belief. It is fraudulent to represent yourself as possessing a belief which you do not possess. This is the ground of liability in the case of reckless misstatement of fact. The maker of the statement represents his mind as certain in the matter, whereas in truth it is not certain. He says that he believes, when he really only hopes or wishes.

It is just as fraudulent for a man to misrepresent wilfully his state of mind as to misrepresent wilfully any other matter of fact. "The state of a man's mind," said Bowen, L.J., "is just as much a fact as the state of his digestion";^a and the rule as to reckless misstatement laid down by Lord Herschell does not in any way widen the definition of fraud.¹

Want of reasonable grounds for belief. But from time to time attempts have been made to widen the definition of fraud, and to make men liable not merely for wilful misstatements of fact or of belief, but for misstatements of fact made in the honest belief of their truth, but not based upon reasonable grounds.

^a *Edgington v. Fitzmaurice*, (1895) 29 Ch. D. 483.

not know whether it was true or false; excluding cases where he believed his statement to be true. *McKown v. Furgason*, (1878) 47 Iowa, 636; *Boddy v. Henry*, (1901) 113 Iowa, 462; *Salisbury v. Howe*, (1881) 87 N.Y. 128; *Townsend v. Felthousen*, (1898) 156 N.Y. 618; *Kountze v. Kennedy*, (1895) 147 N.Y. 124; *Griswold v. Gebbie*, (1889) 126 Pa. 353.

Other courts extend actions for deceit to cases where the defendant believed, or may have believed, his statement to be true. The doctrine of these cases is variously expressed. "If a statement of a fact which is susceptible of actual knowledge is made as of one's own knowledge, and is false, it may be made the foundation of an action for deceit without further proof of an actual intent to deceive." *Weeks v. Currier*, (1898) 172 Mass. 53; *Chatham Furnace Co. v. Moffatt*, (1888) 147 Mass. 403; *Kirkpatrick v. Reeves*, (1889) 121 Ind. 280; *Bullitt v. Farrar*, (1889) 42 Minn. 8 ("And an unqualified affirmation amounts to an affirmation as of one's own knowledge"). "The seller is bound to know that the representations which he makes to induce the sale of his property are true." *Beetle v. Anderson*, (1897) 98 Wis. 5; *Krause v. Busacker*, (1900) 105 Wis. 350. "One is liable for the consequences of a false statement when it is made as a positive representation of an existing fact." *Gerner v. Mosher*, (1899) 58 Neb. 135, 149. "The intent or good faith of the person making false statements is not in issue in such a case." *Johnson v. Gulick*, (1896) 46 Neb. 817. Reasonable care must be used. *Seale v. Baker*, (1888) 70 Tex. 283. If made "without any reasonable knowledge (grounds) *bona fide* to believe it to be true." *Trimble v. Reid*, (1895) 97 Ky. 713, 721.

An action for deceit lies for innocent misrepresentations in Michigan. *Holcomb v. Noble*, (1888) 69 Mich. 396; *Totten v. Burhans*, (1892) 91 Mich. 495. This would also seem to be practically true in Nebraska and Wisconsin. See cases from those states cited above.

¹ *Hickey v. Morrell*, (1886) 102 N.Y. 454; *Conlan v. Roemer*, (1889) 52 N.J. L. 53; *Old Colony Trust Co. v. Dubuque Co.*, (1898) 89 Fed. 794.

The rule was settled in the common-law courts, as long ago as 1844, that a misstatement of fact made with an honest belief in its truth was not a ground for an action of deceit, and that "fraud in law" or "legal fraud" is a term which has no meaning as indicating any ground of liability.^a

But shortly after the Judicature Act came into effect judges whose experience had lain chiefly in courts of equity came to deal with the common-law action of deceit, and applied to it from time to time the somewhat ill-defined notions of fraud, which had prevailed in the equity courts.^b In *Weir v. Bell*^c the dissenting judgment of Cotton, L.J., contains a *dictum* that a man is liable for deceit, "if he has made statements which are in fact untrue, recklessly, that is, *without any reasonable grounds for believing* them to be true."

This view of liability for deceit was not accepted by the majority of the court, and the case is remarkable for an emphatic condemnation by Bramwell, L.J., of the use of the term "legal fraud":

"To make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud; to my mind it has no more meaning than legal heat or legal cold, legal light or legal shade."¹

Nevertheless in *Smith v. Chadwick*^d the view of fraud expressed by Cotton, L.J., was adopted and extended by Sir G. Jessel. He there says that a misstatement made carelessly, but with a belief in its truth and with no intention to deceive, renders the maker liable to an action for deceit.

Evidently a confusion was growing up between misrepresentation which is a ground for rescinding a contract, and misrepresentation which is a ground for an action of deceit. The matter came to an issue in *Derry v. Peek*.^e

The defendants were directors of a tramway company, which had power by a special act to make tramways, and with the consent of the Board of Trade to use steam power to move the carriages. In order to obtain the special act the plans of the company required the approval of the Board of Trade, and the directors assumed, that as their plans had been approved by the board before their act was passed, the consent of the board to the

^a *Collins v. Evans*, (1844) 5 Q.B. 820.

^b Thus Sir E. Fry (*Specific Performance*, (5th ed.), p.347 speaks of fraud as including "not only misrepresentation when fraudulent, but also all other unconscionable or deceptive dealing of either party to any contract."

^c (1878) 3 Ex. D. 242.

^d (1884) 20 Ch. D. 44.

^e (1889) 14 App. Cas. 337.

¹ *Cf. post*, § 227.

use of steam power, which they had to obtain after the act was passed, would be given as of course. They issued a prospectus in which they called attention to their right to use steam power, as one of the important features of their undertaking. The consent of the Board of Trade was refused: the company was wound up, and a shareholder brought an action of deceit against the directors.

Stirling, J.,^a found as a fact that the defendants "had reasonable grounds for the belief" expressed in the prospectus, and that they were innocent of fraud. The Court of Appeal held that although the prospectus expressed the honest belief of the directors, it was a belief for which no reasonable grounds existed, and that the directors were therefore liable. The House of Lords reversed the decision of the Court of Appeal. The cases are exhaustively discussed in the judgment of Lord Herschell, and the conclusion to which he comes is thus expressed:

"In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. . . . At the same time, I desire to say distinctly that when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one."^b

The rule may therefore be regarded as settled that a statement made with an honest belief in its truth cannot render the maker liable for deceit,^c though the absence of reasonable grounds for belief may go to show that the belief expressed was not really entertained, in other words that the man who made

^a *Peek v. Derry*, (1887) 37 Ch. D. 541, 565.

^b *Derry v. Peek*, (1889) 14 App. Cas. 375.

^c It is stated on high authority that a representation, believed to be true when made, but afterwards discovered to be false, amounts to fraud if the transaction is allowed to continue on the faith of it. If this means that an action of deceit would lie, there must be something said or done confirmatory of the statement after it is known to be false. Lord Blackburn in *Brownlie v. Campbell*, (1880) 5 App. Cas. p. 950.

¹ There are many cases in the United States holding the defendant liable in damages for the consequences of his innocent misrepresentations. The liability in such cases is not due to *deceit* or *fraud*, but is based upon negligence or upon a "prophylactic" rule of absolute liability the purpose of which is the prevention of damage by establishing a much higher standard of care. See *ante*, §§ 196-199, and notes; also note to § 223, *ante*. See Smith, 14 *Harvard Law Review*, 184. Cf. also, *post*, § 227.

the statement represented himself to possess a belief which he did not possess.¹

It may well happen in the course of business that a man is tempted to assert for his own ends that which he wishes to be true, which he does not know to be false but which he strongly suspects to have no foundation in fact. If he asserts such a thing with a confident assurance of belief, or if he neglects accessible means of information, his statement is not made in an honest belief of its truth; he may have taken care not to acquaint himself with inconvenient facts.

"But *Peek v. Derry* has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained."²

Dishonest motive not necessary. There is another aspect of fraud in which the fraudulent intent is absent but the statement made is known to be untrue. Such is the case of *Polhill v. Walter*, cited above.³ That decision is confirmed by the judgment of Lord Cairns in *Peek v. Gurney*.⁴ The plaintiff in that case had purchased shares from an original allottee on the faith of a prospectus issued by the directors of a company, and he brought an action of deceit against the directors. Lord Cairns compared the statements in the prospectus with the circumstances of the company at the time they were made, and came to the conclusion that the statements were not justified by facts. He then proceeded to point out that though these statements were false, yet the directors might well have thought, and probably did think, that the undertaking would be a profitable one.

"But," he says, "in a civil proceeding of this kind all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? And if there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which would properly result from what was done."

The rule is a sound one. If a man chooses to assert what he knows or even suspects to be false, hoping, perhaps believing, that all will turn out well, he cannot rely upon the excellence of

^a *Angus v. Clifford*, [1891] 2 Ch. (C.A.) 463.

^b *Ante*, § 197.

^c (1873) L.R. 6 H.L. 409.

¹ See *Salisbury v. Howe*, (1881) 87 N.Y. 128.

² Of course this is not true for the United States, and it is believed that it expresses altogether too strong an assurance as to the certainty and permanence of the rule in England; e.g., see *ante*, § 212.

his motives to defend him from the natural inferences and results which follow upon his conduct.¹

224. *Intent that it be acted upon by injured party.* The representation must be made *with the intention that it should be acted upon by the injured party.*

We may divide this proposition into two parts. (1) The representation need not be made to the injured party; (2) it must be made with the intention that he should act upon it.

(1) Levy sold a gun to the father of Langridge for the use of himself and his sons, representing that the gun had been made by Nock and was "a good, safe, and secure gun": Langridge used the gun; it exploded, and so injured his hand that amputation became necessary. He sued Levy for the false representation, and the jury found that the gun was unsafe, was not made by Nock, and found generally for the plaintiff. It was urged, in arrest of judgment, that Levy could not be liable to Langridge for a representation not made to him; but the Court of Exchequer^a held that, since the gun was sold to the father to be used by his sons, and the false representation made in order to effect the sale, and as "there was fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."²

(2) In *Peek v. Gurney*^b directors were sued by persons who had purchased shares in a company on the faith of false statements contained in a prospectus issued by the directors. The plaintiffs were not those to whom shares had been allotted on the first formation of the company; they had purchased their shares from such allottees. It was held that the prospectus was only addressed to the first applicants for shares; that the intention to deceive could not be supposed to extend to others than these;

^a *Langridge v. Levy*, (1837) 2 M. & W. 519.

^b (1873) L.R. 6 H.L. 377.

¹ *Boyd's Exr's v. Browne*, (1847) 6 Pa. 310.

² Putting on the market an article known to the vendor to be dangerously defective may render him liable to a third person injured thereby, and the liability is not necessarily based on deceit. *Huset v. Case Threshing Machine Co.*, (1903) 120 Fed. 865; *Kuelling v. Lean Mfg. Co.*, (1905) 183 N.Y. 78; *Lewis v. Terry*, (1896) 111 Cal. 39; *State v. Fox*, (1894) 79 Md. 514.

Representations intended to be communicated to the plaintiff are illustrated by representations made to a commercial agency and acted upon by its patrons. *Eaton v. Avery*, (1880) 83 N.Y. 31; *Tindle v. Birkett*, (1902) 171 N.Y. 520. See *Stevens v. Ludlum*, (1891) 46 Minn. 160.

and that on the allotment "the prospectus had done its work; it was exhausted."¹

The law had been so stated in an earlier case.

"Every man must be held responsible for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, *provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss.* . . . But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made."^a

But if a prospectus is only a part of a scheme of fraud maintained by false statements deliberately inserted from time to time in the press, its effect is not held to be exhausted by the allotment of shares, and its falsehoods will afford ground for an action of deceit to others than the allottees,^b for the whole mass of false statement is intended to induce the public at large to continue to purchase shares and thus keep their value inflated.

225. Injured party must act upon it. The representations must actually deceive.

"In an action of deceit the plaintiff cannot establish a title to relief simply by showing that the defendants have made a fraudulent statement: he must also show that he was deceived by the statement and acted upon it to his prejudice."^c

Thomas bought a cannon of Horsfall. The cannon had a defect which made it worthless, and Horsfall had endeavored to conceal this defect by the insertion of a metal plug into the weak spot in the gun. Thomas never inspected the gun; he accepted it, and upon using it for the purpose for which he bought it the gun burst. It was held that the attempted fraud, having had no operation upon his mind, did not exonerate him from paying for the gun. "If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him."^{d 2}

^a Barry v. Croakey, (1861) 2 J. & H. 1, p. 22.

^b Andrews v. Mockford, [1896] 1 Q.B. (C.A.) 372.

^c Arkwright v. Newbold, (1881) 17 Ch. D. 324.

^d Horsfall v. Thomas, (1862) 1 H. & C. 90.

¹ Hunnewell v. Duxbury, (1891) 154 Mass. 286. See Morgan v. Skiddy, (1875) 62 N.Y. 319; Brackett v. Griswold, (1889) 112 N.Y. 454.

² But one who puts on the market a dangerously defective article concealing the defect is liable as for deceit to any one injured thereby. See § 224, ante, note.

This judgment has been severely criticized by high authority,^a but it seems to be founded in reason, and the principle has been followed in a later case. Action was brought by an omnibus company to restrain an omnibus proprietor from so painting and lettering his omnibuses as to induce the public to believe that they were the plaintiffs'. The learned judge who tried the case viewed two omnibuses, and decided against the defendant on the ground that the painting of his omnibus was calculated to deceive the public. The Court of Appeal dismissed the action on the ground that there was no evidence that any member of the public had actually been deceived.^{b 1}

We may lay down the general rule that deceit which does not affect conduct cannot create liabilities.²

(2) *Effect of fraud, and remedies therefor*

We may now consider the effect of fraud, such as we have described it to be, upon rights *ex contractu*.

226. Remedies for fraud. Apart from contract, the person injured by fraud, such as we have described, has an action of tort, viz., the common law action for deceit, and may recover by that means such damage as he has sustained; an analogous remedy exists in equity where the plaintiff would otherwise, as in cases of fraud by directors, have to bring a number of separate actions of deceit, or would for some reason be destitute of legal remedy.^{c 2} These remedies are not confined to fraud as affecting

^a See *dicts* of Cockburn, *Smith v. Hughes*, (1871) L.R. 6 Q.B. at p. 605.

^b *London General Omnibus Co. v. Lavell*, [1902] 1 Ch. (C.A.) 135.

^c *Peck v. Gurney*, (1873) L.R. 6 H.L. at p. 390; *Barry v. Crookay*, (1861) 2 J. & H. 30.

¹ But see *Stone v. Carlan*, (1850, N.Y.) 2 Sandf. 738; *T. A. Vulcan v. Myers*, (1893) 139 N.Y. 364; *Weinstock v. Marks*, (1895) 109 Cal. 529.

² *Slaughter's Adm'r v. Gerson*, (1871, U.S.) 13 Wall. 379; *Sheldon v. Davidson*, (1893) 85 Wis. 138; *Long v. Warren*, (1877) 68 N.Y. 426 [cf. *Albany City Sav. Inst. v. Burdick*, (1881) 87 N.Y. 40; *Schumaker v. Mather*, (1892) 133 N.Y. 590]; *Brackett v. Griswold*, (1889) 112 N.Y. 454; *Lewis v. Jewell*, (1890) 151 Mass. 345.

³ *Mack v. Latta*, (1904) 178 N.Y. 525. If the defrauder has obtained possession of specific chattels by his fraud the injured party can maintain detinue, trover, or replevin, as well as an action on the case for deceit. If the injured party has received nothing in return, he is from the very outset *privileged* to retake the chattel of which he has been deprived by fraud so long as he commits no breach of the peace; the wrongdoer has the *duty* of returning the specific chattel as well as the duty of paying damages. If the injured party has received something of value, he must tender this back before he has the privilege of retaking or the wrongdoer is under the duty of returning. The injured party has the *power* of creating such privilege and duty by making a tender — or, as the courts say, by "rescinding."

the formation of contract; they apply to any fraudulent statement which leads the person to whom it is made to alter his position for the worse.

But we have to consider fraud and its effects in relation to contract. We must therefore ask what are the remedies *ex contractu* open to one who finds that he has been induced to enter into a contract by fraud.

1. He may treat the contract as binding and may demand fulfillment of those terms which misled him or damages for such loss as he has sustained by their non-fulfillment.¹

He cannot, however, enforce a fulfillment of the terms of the contract unless the false statement by which he has been deceived is of such a character as to take effect by way of estoppel. The nature of the liability which may arise from the application of this rule of evidence has been explained elsewhere, and is not limited to cases in which the relations of the parties originated in contract.²

In like manner one who has been induced to purchase a chattel by fraud may retain the chattel and sue for loss sustained by the fraud.

But the exercise of this right must depend on the nature of the contract. A man cannot remain a shareholder and sue the company of which he is a member, though he was induced to purchase shares by the fraud of the directors. Nor can he divest himself of the character of a shareholder, and so put himself in a position to sue, after the company has gone into liquidation.³

2. He may avoid or repudiate the contract by taking steps to get it canceled in the Chancery Division on the ground of fraud; by resisting a suit for specific performance,⁴ or an action for damages in respect of it;⁴ or, as soon as he suspects or

^a *Houldsworth v. City of Glasgow Bank*, (1880) 5 App. Cas. 317.

¹ *Vail v. Reynolds*, (1890) 118 N.Y. 297.

² That this is not a rule of evidence, see *ante*, § 212, note. The action for damages for the false representation is always an action of tort, unless the deceiver has warranted its truth in terms, or unless he has promised to bring about a certain result that he now fails to bring about because of the falsity of the representation. The foregoing warranty seems to be a promise to pay losses, a sort of insurance promise. If the promise above described is not fulfilled, the damages would be the value of the result promised — the amount of the promisee's expected gain or addition to his estate. In a tort action for deceit, the damages would be the value of which the plaintiff has been deprived — the amount already subtracted from his estate.

³ *Margraf v. Muir*, (1874) 57 N.Y. 155; *Brown v. Pitcairn*, (1892) 148 Pa. 387; *Kelly v. Cent. Pac. Ry.*, (1888) 74 Cal. 557.

⁴ *Brown v. Montgomery*, (1859) 20 N.Y. 287; *Smith v. Countryman*,

becomes aware of the fraud, by divesting himself of all interest in the contract.

Thus if a shareholder, suspecting fraud, declines to pay calls and thereby incurs the forfeiture of his shares, he becomes merely a debtor to the company and can resist payment of his debt on the plea of fraud.^{a 1}

3. If after becoming aware of the fraud he fails to give notice of his intention to avoid the contract, he may lose his power to affirm or avoid, and may be left to his action for deceit.

He may lose this power — firstly, if he take any benefit under the contract or do any act which amounts to an affirmation of it.²

Or secondly, if before he exercises his option circumstances have so far changed that the parties cannot be placed in their former position.³ A shareholder who has been induced to take shares by false statements in a prospectus cannot disaffirm his contract if he waits until a petition has been filed for the winding up of the company,^b or *a fortiori* if a winding-up order has been made and the company has gone into liquidation.^{c 4}

^a Aaron's Reefs v. Twiss, [1896] A.C. 273.

^b Whiteley's Case, [1890] 1 Ch. 770.

^c Oakes v. Turquand, (1867) L.R. 2 H.L. 325.

(1864) 30 N.Y. 655. Or he may disaffirm and recover in an appropriate action what he may have parted with; *Hennequin v. Naylor*, (1861) 24 N.Y. 139; *Thurston v. Blanchard*, (1839, Mass.) 22 Pick. 18; or retake goods without action if he can do so peaceably; *Smith v. Hale*, (1893) 158 Mass. 178.

¹ So long as the injured party has received nothing under the contract, he is under no *duty* whatever; in other words, he has the *privilege* of not performing. If sued, he needs only to aver the fraud and deny his duty. He has, however, the *power* of creating by ratification all of the contemplated contractual relations. If he has received something under the contract, his legal relations are different. If sued, he cannot now deny the duty without first tendering back that which he received. Before such tender there is a duty, voidable in character. This means that he has a duty, but has also a *power* of extinguishing that duty by making a tender — or, as the courts say, by “rescinding.”

² “The invariable rule is that the right to rescind may be exercised upon discovery of the fraud; but any act of ratification of a contract, after knowledge of the facts authorizing a rescission, amounts to an affirmation, and terminates the right to rescind.” This “right to rescind” is the *power* of extinguishing the existing contractual relations. *Crooks v. Nippolt*, (1890) 44 Minn. 239; *Bach v. Tuch*, (1891) 126 N.Y. 53; *Droege v. Ahrens*, (1900) 163 N.Y. 466; *O'Donald v. Constant*, (1882) 82 Ind. 212.

³ “A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*.” *Grymes v. Sanders*, (1876) 93 U.S. 55; *Bassett v. Brown*, (1870) 105 Mass. 551; *Bostwick v. Ins. Co.*, (1903) 116 Wis. 392; *Rigdon v. Walcott*, (1892) 141 Ill. 649.

⁴ See *Lantry v. Wallace* (1900) 182 U.S. 536; *Howard v. Turner*, (1893) 155 Pa. 349.

Or thirdly, since the contract is voidable, not void, — is valid until rescinded, — if third parties *bona fide* and for value acquire property or possessory rights in goods obtained by fraud, these rights are valid against the defrauded party.^{a 1}

Lapse of time, which of itself has no effect on the rights of the defrauded party, may, if coupled with knowledge of the fraud furnish evidence of an intention to affirm. Delay, in any event, increases the chance that the position of the parties may change, or that third parties may acquire rights and that the power to rescind may thus be lost.^{b 2}

From the results of fraud such as we have described, — fraud which makes a contract voidable — we must distinguish fraud which, whether by personation or other device, induces a man to go through the form of agreement while he is mistaken as to the nature of the agreement, or as to the individual with whom he is dealing.

We have dealt with these cases under the head of Mistake;^c they are cases in which no true consent has been expressed, in which the contract is void, and in which an innocent third party who may have acquired goods for value from the fraudulent person has no title to the goods against the victim of the fraud.^d

^a Babcock v. Lawson, (1880) 4 Q.B.D. 394.

^b Charter v. Trevelyan, (1844) 11 Cl. & F. 714; Clough v. L. & N.W.R. Co., (1871). L.R. 7 Ex. 35.

^c *Ante*, § 184.

^d By the Larceny Act, 1861, (24 & 25 Vict. c. 96) § 100, in the case of goods obtained by false pretences, the title of the defrauded owner reverted in him if the swindler was prosecuted to conviction by or on behalf of the owner, and he might recover the goods from an innocent purchaser for value. The Sale of Goods Act (56 & 57 Vict. c. 71) § 24 (2) overrides this provision. The title to goods thus obtained does not revert upon conviction, though the convicting court may make an order for their restitution. Bentley v. Vilmont, (1887) 12 App. Cas. 471.

¹ Rowley v. Bigelow, (1832, Mass.) 12 Pick. 307; Dettra v. Kestner, (1892) 147 Pa. 566; Paddon v. Taylor, (1871) 44 N.Y. 371. This rule shows that in spite of his fraud the defrauder may possess the power of extinguishing such property rights, powers, privileges, and immunities as the injured party had remaining after the transaction and of investing a *bona fide* purchaser for value with the customary property relations. It is the possession of this power that has caused writers and judges to say that a defrauder gets "legal title." This term will eventually be abandoned because it is a complex term of variable and slippery connotation. In its place must be substituted the simpler conceptions of rights, powers, privileges, immunities, and their correlative duties, liabilities, no-rights, and disabilities. By their means it is possible to set forth the existing legal relations of persons much more clearly and accurately.

² Williamson v. Ry., (1878) 29 N.J. Eq. 311; Baird v. Mayor, (1884) 96 N.Y. 567; Grymes v. Sanders, (1876) 93 U.S. 55.

(3) *Fraud in equity*

227. Conduct not involving deceit; equitable remedies.¹ In a recent case^a in the House of Lords the true scope and application of the judgments in *Derry v. Peek* have been considered, and attention drawn to the fact that the principles there laid down do not in any way narrow the remedies previously given by the Court of Chancery in cases over which it exercised at one time an exclusive jurisdiction and which "although classified in that court as cases of fraud, yet did not necessarily import the element of *dolus malus*." Such cases are to be found where there has been a breach of a special duty recognized and enforced by the Court of Chancery, whether arising from the fiduciary relationship of the parties or the special circumstances of the case.

"It must now be taken to be settled," said Lord Haldane, L.C., "that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit. This is so whether a Court of Law or a Court of Equity, in the exercise of concurrent jurisdiction, is dealing with the claim, and in this strict sense it was quite natural that Lord Bramwell and Lord Herschell should say that there was no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that a natural intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression 'constructive fraud' came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection, is not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience.

"If among the great common lawyers who decided *Derry v. Peek*," he adds, "there had been present some versed in the practice in the

^a *Nocton v. Ashburton*, [1914] A.C. 932.

¹ This section evidences further the growing pains of the law, incident in part to the amalgamation of equity with the common law. It is apparent that the law of to-day — not the common law of yesterday — recognises duties that do not fall within the principles laid down in *Derry v. Peek*. In the United States they are frequently enforced without the aid of the terminology of equity. See *ante*, §§ 196-199, 212, 223.

Court of Chancery, it may well be that the decision would not have been different, but that more and explicit attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, Courts of Equity gave a remedy."

In *Nocton v. Ashburton*,^a the case from which the above quotations are taken, a mortgagee sued his solicitor, alleging that the solicitor had by improper advice induced him to release a part of his security, whereby the security had become insufficient, that the advice was not given in good faith but in the solicitor's own interest, and that when it was given the solicitor well knew that the security would thereby be rendered insufficient. The House of Lords held that fraudulent misrepresentation in the sense of *Derry v. Peek* had not been proved, and that damages for deceit could not therefore be recovered; but they held also that there had been a breach of the duty imposed on the solicitor by the confidential relationship in which he stood to his client which entitled the latter to the relief which the Court of Chancery has been accustomed to give in such cases, viz., compensation for the loss which the breach of duty had caused him.¹

This case illustrates principles which we shall have to consider later under the heading of Undue Influence; but the illuminating distinction² drawn in it between the fraud which gives rise to an action for deceit (as defined in *Derry v. Peek*) and the fraud of which courts of equity take cognizance makes it convenient and desirable to refer to it in this place. The decision confirms and emphasizes *Derry v. Peek*, but makes it clear that the absence of proof of an intention to deceive does not in all cases deprive of a remedy the person who has in fact suffered from deception.³

IV. DURESS

228. Nature and effect of duress. A contract is voidable at the option of one of the parties if he have entered into it under duress.

Duress consists in actual or threatened violence or imprisonment; the subject of it must be the contracting party himself, or his wife, parent, or child; and it must be inflicted or threat-

^a [1914] A.C. 932.

¹ This is, of course, identical with *damages* (for they too are measured by the plaintiff's loss) eliminating any possible punitive element.

² The present editor is tempted to describe this "illuminating distinction" as judicial camouflage.

³ Cf. *ante*, § 223.

ened by the other party to the contract, or else by one acting with his knowledge and for his advantage.^{a 1}

A contract entered into in order to relieve a third person from duress is not voidable on that ground; though a simple contract, the consideration for which was the discharge of a third party by the promisee from an illegal imprisonment, would be void for lack of any legally operative consideration.^b

Nor is a promise voidable for duress which is made in consideration of the release of goods from detention.² If the detention is obviously wrongful the promise would be void for want of consideration; ³ if the legality of the detention was doubtful the promise might be supported by a compromise. But money paid for the release of goods from wrongful detention may be recovered back in virtue of the quasi-contractual relation created by the receipt of money by one person which rightfully belongs to another.^{c 4}

The Court of Appeal has held that an agreement induced by moral pressure, such as a threat to prosecute a near relation, is not one which the courts of this country will enforce;^d not so much (it seems) for the reason that moral pressure of this kind is to be regarded as negating the existence of a genuine consent between the parties to the contract, as because it is against the general policy of the law to allow a plaintiff to maintain an

^a 1 Rolle, Abr. 688.

^b *Huscombe v. Standing*, (1606) Cro. Jac. 187.

^c *Atlee v. Backhouse*, (1838) 3 M. & W. 633. See post, "Quasi-Contract."

^d *Kaufman v. Gerson*, [1904] 1 K.B. 591.

¹ While some American states confine the doctrine of duress within the cases specified by the early common law, the modern tendency is to include all such threats as would overcome the will of a person of ordinary firmness. *Morse v. Woodworth*, (1892) 155 Mass. 233. And some recent cases reject this average standard and simply inquire whether the threats did in fact overcome the will of the person in question. *Silsbee v. Webber*, (1896) 171 Mass. 378; *Galusha v. Sherman*, (1900) 105 Wis. 263. See *Radich v. Hutchins*, (1877) 95 U.S. 210; *Parmentier v. Pater*, (1885) 13 Or. 121; *Spaids v. Barrett*, (1870) 57 Ill. 289; *McPherson v. Cox*, (1881) 86 N.Y. 472. The cases tend to assimilate duress to the doctrines of undue influence. *Galusha v. Sherman*, *supra*; *Adams v. Irving Bank*, (1889) 116 N.Y. 606; *Foote v. De Poy*, (1905, Iowa) 102 N.W. 112.

² But see *Sasportas v. Jennings*, (1795, S.C.) 1 Bay, 470; *Collins v. Westbury*, (1799, S.C.) 2 Bay, 211; *Spaids v. Barrett*, *supra*; *McPherson v. Cox*, *supra*; *Loneragan v. Buford*, (1893) 148 U.S. 581.

³ *Tolhurst v. Powers*, (1892) 133 N.Y. 460.

⁴ *Fergusson v. Winslow*, (1885) 34 Minn. 384; *Stanton v. Jerome*, (1873) 54 N.Y. 480; *Briggs v. Boyd*, (1874) 56 N.Y. 289; *Loneragan v. Buford*, *supra*. Observe from this that the facts that will operate to render voidable a contract based upon some valid consideration are not the same as the facts that will operate to create a duty to pay back value received without any consideration.

action on an agreement so unfairly obtained.^{a 1} It is, however, not always easy since the Judicature Act to distinguish between duress properly so called and the unconscientious dealing known to courts of equity as "undue influence," which is discussed below; and *Kaufman v. Gerson*, the case in question, is in truth an illustration of the narrowness of the border-line which now separates the two.

V. UNDUE INFLUENCE

229. **Fraud in equity.** It has been shown that the use of the term fraud has been wider and less precise in the chancery than in the common-law courts. This followed necessarily from the remedies which they respectively administered. Common law gave damages for a wrong, and was compelled to define with care the wrong which furnished a cause of action. Equity refused specific performance of a contract, or set aside a transaction, or gave compensation where one party had acted unfairly by the other. Thus "fraud" at common law is a false statement such as is described in the preceding section: fraud in equity has often been used as meaning unconscientious dealing² — "although, I think, unfortunately," a great equity lawyer has said.^b

One form of such dealing is commonly described as the exercise of "undue influence." The subject can only be dealt with here in outline. Whether or no relief is granted in any given case must often depend on the view taken by the court of the character or tendency of a number of transactions extending over a considerable time.

230. **Definition of undue influence.** But we must find a defi-

^a *Williams v. Bayley*, (1866) L.R. 1 H.L. 200.

^b Lord Haldane in *Nocton v. Ashburton*, [1914] A.C. 932, 953.

¹ But this reason is identical with that for refusing to enforce agreements induced by duress in the older and narrower sense. There is no distinction based upon "reality" or "genuineness" of consent. Customary morality changes and the law grows.

² Nothing is gained by setting the term "wrong" over against the term "unconscientious dealing." When equity gives damages or other remedy for the latter there is as much reason for defining it "with care" as there is when the common law gives damages for a "wrong." The common-law definition merely represents an older and now declining state of customary morality, just as did the common-law content of the *caveat emptor* doctrine. The fact is that an exact definition for the future is impossible, for it would be merely a prediction as to future morality. Definition and general rule always represent the last stage in legal development. Courts always have to decide cases first.

nitition of undue influence; and then proceed to consider and classify the circumstances which create it; and we may be aided in the process of classification by certain principles which equity judges have laid down as to the enforcement of promises or gifts made for no consideration or for a consideration wholly disproportionate to the value of the thing promised or given.

Lord Selborne supplies a definition in *The Earl of Aylesford v. Morris*.^a Speaking of the cases "which, in the language of Lord Hardwicke, raise, from the circumstances and conditions of the parties contracting, a presumption of fraud," he says:

"Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable."¹

The principles to which I alluded are these:

(a) that equity will not decree specific performance of a gratuitous promise even though it be under seal;^{b 2}

(b) that the acceptance of a voluntary donation throws upon the person who accepts it the necessity of proving "that the transaction is righteous";^{c 3}

(c) that inadequacy of consideration is regarded as an element in raising the presumption of undue influence or fraud;^{d 4}

(d) but that mere inadequacy of consideration will not (ac-

^a (1873) 8 Ch. 490.

^b *Kekewich v. Manning*, (1851) 1 D.M.G. 188.

^c *Hoghton v. Hoghton*, (1852) 15 Beav. 299.

^d *Wood v. Abrey*, (1818) 3 Mad. 423.

¹ "In all transactions between parties occupying relations, whether legal, natural or conventional in their origin, in which confidence is naturally inspired, or in fact reasonably exists, the burden of proof is thrown upon the person in whom the confidence is reposed, and who has acquired an advantage, to show affirmatively not only that no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood." *Hall v. Otterson*, (1894) 52 N.J. Eq. 522, 528; *Slack v. Rees*, (1904) 66 N.J. Eq. 447.

² *Crandall v. Willig*, (1897) 166 Ill. 233. Nor correct an executed conveyance as against the donor. *Eaton v. Eaton*, (1862) 15 Wis. 259.

³ This does not seem to be so in the United States except in cases where there is a special relation shown or the proof establishes that the donee has in fact acquired some undue influence. See *Willemijn v. Dunn*, (1879) 93 Ill. 511; *Pressley v. Kemp*, (1881) 16 S.C. 334; *Haydock v. Haydock*, (1881) 34 N.J. Eq. 570; *Brown v. Mercantile Trust Co.*, (1898) 87 Md. 377; *Cowee v. Cornell*, (1878) 75 N.Y. 91, 99; *Barnard v. Gantz*, (1893) 140 N.Y. 249.

⁴ *Wormack v. Rogers*, (1850) 9 Ga. 60; *Talbott v. Hooser*, (1876, Ky.) 12 Bush, 408; *Allore v. Jewell*, (1876) 94 U.S. 506.

according to the strong tendency of judicial opinion) amount to proof of either.^{a 1}

So the question which we have to discuss may be put thus: When a man demands equitable remedies, either as plaintiff or defendant, seeking to escape or avoid a grant or promise made gratuitously or for a very inadequate consideration, what must he show in addition to this in order to raise the presumption that undue influence has been at work?

The cases fall into three fairly distinct groups:

231. Presumption from inequality of parties. (1) There are cases in which the court will regard the transaction as *prima facie* unfair, and require the person who has benefited to show that it is in fact fair and reasonable.

Formerly the usury laws were supposed to protect the borrower; while the vendor of a reversionary interest was protected by a rule of equity which required the purchaser, at any time, to show that he had given value for his bargain.²

The usury laws are repealed, and the rule of equity as to reversions is set aside by the Sale of Reversions Act, 1867,^b but the Moneylenders Acts, 1900^c and 1911 enable any court (including county courts), in any proceedings taken by a moneylender for the recovery of money lent, to reopen the transaction if satisfied "that the interest charged in respect of the sums actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that in either case the transaction is harsh and unconscionable or is otherwise such that a court of equity would give relief."

A moneylender, according to the definition in the Act, is a person who carries on the business of moneylending as a business in itself and not as incidental to another business (such as banking);^d and it is enough to say that the court will treat a

^a *Coles v. Trecothick*, (1804) 9 Ves. 246.] ^b 31 & 32 Vict. c. 4.

^c 63 & 64 Vict. c. 51.

^d *Litchfield v. Dreyfus*, [1906] 1 K.B. 584.

¹ *Seymour v. Delancy*, (1824, N.Y.) 3 Cow. 445; *Erwin v. Parham*, (1851, U.S.) 12 How. 197. *Bispham*, Princ. of Eq., § 219.

² A sale of a vested reversionary interest stands on the same ground as the sale of any other property. *Cribbens v. Markwood*, (1856, Va.) 13 Gratt. 495; *Davidson v. Little*, (1853) 22 Pa. 245 [but see *Poor v. Hasleton*, (1844) 15 N.H. 564; *Nimmo v. Davis*, (1851) 7 Texas, 26]. Or the sale of a legacy. *Parmelee v. Cameron*, (1869) 41 N.Y. 392. But the sale of a mere expectancy is apparently absolutely of no effect. *Boynnton v. Hubbard*, (1810) 7 Mass. 112; *Alves v. Schlesinger*, (1883) 81 Ky. 290. Cf. *Hoyt v. Hoyt*, (1889) 61 Vt. 413.

and the price must be such as the court would consider to be fair.¹

233. No presumption. (3) Where there are no such relations between the parties as create a presumption of influence, the burden of proof rests on the donor or promisor to show that undue influence was, in fact, exercised.² If this can be shown the courts will give relief.

"The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the court of equity most ordinarily deals are those of trustee and *cestui que trust*, and such like. It applies specially to those cases, for this reason and for this reason only, that from those relations the court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense and the technical rules of a court of equity are just as applicable in the one case as the other."³

The words quoted are those of Lord Kingsdown: the case was one in which a young man, only just of age, had incurred liabilities to the plaintiff by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. It was held that influence of this nature, though it certainly could not be called parental, spiritual, or fiduciary, entitled the plaintiff to the protection of the court.

Similar in character was the later case of *Morley v. Loughnan*,^b an action brought by executors to recover money paid by the deceased to a man in whose house he had lived for some years. Wright, J., in giving judgment for the plaintiffs, said that it was unnecessary to decide whether a fiduciary relation existed between the deceased and Loughnan, or whether spiritual influence had determined the gifts. "The defendant took possession, so to speak, of the whole life of the deceased, and the gifts were not the result of the deceased's own free will, but the effect of that influence and domination."^c

234. Power of rescission. The power to rescind contracts and

^a *Smith v. Kay*, (1859) 7 H.L.C. 779.

^b [1893] 1 Ch. 736.

¹ *Nesbit v. Lockman*, (1866) 34 N.Y. 167; *Whitehead v. Kennedy*, (1877) 69 N.Y. 462; *Ross v. Payson*, (1896) 160 Ill. 349; *Whipple v. Barton*, (1885) 63 N.H. 613; *Dunn v. Dunn*, (1886) 42 N.J. Eq. 431.

² *Cowee v. Cornell*, (1878) 75 N.Y. 91; *Doherty v. Lacy*, (1901) 168 N.Y. 213.

³ See *Ross v. Conway*, (1892) 92 Cal. 632.

to revoke gifts made under undue influence is similar to the power of rescinding contracts induced by fraud. Such transactions are voidable, not void. So soon as the undue influence is withdrawn, the action or inaction of the party influenced becomes liable to the construction that he intended to affirm the transaction.¹

Thus in *Mitchell v. Homfray*^a a jury found as a fact that a patient who had made a gift to her physician determined to abide by her gift after the confidential relation of physician and patient had ceased, and the Court of Appeal held that the gift could not be impeached.

In *Allcard v. Skinner*^b the plaintiff allowed five years to elapse before she attempted to recall gifts made to a sisterhood from which she had retired at the commencement of that time; during the whole of the five years she was in communication with her solicitor and in a position to know her privileges and powers. In this case also the Court of Appeal held that the conduct of the donor amounted to an affirmation of the gift.

But the affirmation is not valid unless there be an entire cessation of the undue influence which has brought about the contract or gift. The necessity for such a complete relief of the will of the injured party from the dominant influence under which it has acted is thus set forth in *Moxon v. Payne*:^c

"Fraud or imposition cannot be condoned; the right to property acquired by such means cannot be confirmed in this court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practiced."

The same principle is supplied where a man parts with a valuable interest under pressure of poverty and without proper advice. Acquiescence is not presumed from delay: on the contrary, "it is presumed that the same distress which pressed him to enter into the contract prevented him from coming to set it aside."^d

^a (1881) 8 Q.B.D. 587.
^c (1873) 8 Ch. 581.

^b (1885) 36 Ch. D. 145.
^d *In re Fry*, (1888) 40 Ch. D. at p. 324.

¹ *Jenkins v. Pye*, (1838, U.S.) 12 Pet. 241; *Rogers v. Higgins*, (1870) 57 Ill. 244; *Montgomery v. Pickering*, (1874) 116 Mass. 227.

² *Rau v. Von Zedlitz*, (1882) 132 Mass. 164.

CHAPTER VII

Legality of Object

235. Two subjects of inquiry. There is one more element in the formation of contract which remains to be considered — the object of the parties. Certain limitations are imposed by law upon the freedom of contract. Certain objects of contract are forbidden or discouraged by law; and though all other requisites for the formation of a contract be complied with, yet if these objects are in contemplation of the parties when they enter into their agreement the law will not enforce it.

Two matters of inquiry present themselves in respect of this subject. The first is the nature and classification of the objects regarded by law as illegal. The second is the effect of the presence of such objects upon the contracts in which they appear.

I. NATURE OF ILLEGALITY IN CONTRACT

236. What is illegality? The objects of contract may be rendered illegal by express statutory enactments or by rules of common law. And the rules of common law may be more or less precisely defined.

We may arrange the subject in the following manner:

A contract may be illegal because —

- (1) its objects are forbidden by statute;
- (2) its objects are defined by the common law as constituting an indictable offense or civil wrong;
- (3) its objects are discouraged by the common law as contrary to public policy.

But the two latter heads of illegality are in fact two forms, one more and one less precise, of common-law prohibition. The broad distinction is between contracts illegal by statute and contracts illegal at common law, and it is thus that I propose to treat the subject.

1. *Contracts which are made in breach of statute*

237. Effects of statutory prohibition. A statute may declare that a contract is illegal or void. There is then no doubt of the intention of the legislature that such a contract should not be

enforced. The difference between an *illegal* and a *void* contract is important as regards collateral transactions, but as between the parties the contract is in neither case enforceable.

But a statute may impose a penalty on the parties to a contract, without declaring it to be either illegal or void.

In such a case we have to ascertain whether the legislature intended merely to discourage the contract by making it expensive to both parties; or to avoid it, so that parties would acquire no legal rights under it; or to prohibit it, so that any transactions entered into for its furtherance would be tainted with an illegal purpose.¹

If the penalty was imposed for the protection of the revenue, it is possible that the contract is not prohibited, that the legislature only desired to make it expensive to the parties in proportion as it is unprofitable to the revenue.^{a 2}

The soundness of this distinction has, however, been called in question.^b A better test is to be found in the continuity of the penalty. If the penalty is imposed once for all, and is not recurrent on the making of successive contracts of the kind which are thus penalized, or if other circumstances would make the avoidance of the contract a punishment disproportionate to the offense, it may be argued that such contracts are not to be held void.^c But where the penalty recurs upon the making of every contract of a certain sort, we may assume (apart from revenue cases, as to which there may yet be a doubt) that the contract thus penalized is avoided as between the parties. Whether it is rendered illegal, so as to taint collateral transactions, must be a question of the construction of the statute.³

^a *Brown v. Duncan*, (1829) 10 B. & C. 93.

^b *Cope v. Rowlands*, (1836) 2 M. & W. 158.

^c *Smith v. Mawhood*, (1845) 14 M. & W. 464.

¹ See note in 12 L.R.A. (N.S.) 575-623.

² *Larned v. Andrews*, (1871) 106 Mass. 435; *Aiken v. Blaisdell*, (1869) 41 Vt. 655. But see *Holt v. Green*, (1873) 73 Pa. 198; *Harding v. Hagar*, (1872) 60 Me. 340, (1874) 63 Me. 515.

³ "While, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." *Pangborn v. Westlake*, (1873) 36 Iowa, 546, where a statute imposing a penalty for the sale of each and every lot in any addition to a city unless the plan of such addition was duly recorded, was held not to render such sales illegal. It will be observed that this case escapes the test proposed by the author. There are many other American cases where statutes penalizing

238. **Objects of statutory prohibition.** I will not discuss here in any detail the various statutes by which certain contracts are prohibited or penalized. They relate for the most part (1) to the security of the revenue; (2) to the protection of the public in dealing with certain articles of commerce, (3) or in dealing with certain classes of traders; (4) to the regulation of the conduct of certain kinds of business.¹

239. **Wagering contracts.** There is, however, a kind of con-

or even forbidding certain transactions have been construed to the same effect. *Harris v. Runnels*, (1851, U.S.) 12 How. 79; *Wheeler v. Hawkins*, (1888) 116 Ind. 515, 520; *National Bank v. Matthews*, (1878) 98 U.S. 621; *Niemeyer v. Wright*, (1881) 75 Va. 239; *Ritchie v. Boynton*, (1874) 114 Mass. 431; *Wood v. Erie Ry.* (1878) 72 N.Y. 196; *Gay v. Seibold*, (1884) 97 N.Y. 472. One party to a contract may be prohibited by statute from making it, and the other not. *Irwin v. Curie*, (1902) 171 N.Y. 409.

The following statutes have been construed as rendering contracts made without compliance with the statute void: requiring a license as a condition precedent to engaging in a specified vocation, *Gardner v. Tatum*, (1889) 81 Cal. 370 (physician); *in re Reidy's Est.*, (1910) 164 Mich. 167 (drug clerk); *Tedrick v. Hiner*, (1871) 61 Ill. 189 (lawyer); *Hittson v. Browne*, (1877) 3 Colo. 304 (lawyer, cf. *Harland v. Lilienthal*, (1873) 53 N.Y. 438); *Buckley v. Humason*, (1892) 50 Minn. 195 (broker); *Richardson v. Brix*, (1895) 94 Iowa, 626 (broker); *Goldsmith v. Manufacturers' L. Ins. Co.*, (1918, Md.) 103 Atl. 627 (insurance broker); *Wells v. People*, (1874) 71 Ill. 532 (public school teacher); requiring weights and measures to be sealed as a condition precedent to sale of goods by merchant, *Bisbee v. McAllen*, (1888) 39 Minn. 143; *Smith v. Arnold*, (1871) 106 Mass. 269; cf. *Eaton v. Kegan*, (1874) 114 Mass. 433; requiring goods to be inspected, labeled, or stamped, *Baker v. Burton*, (1887) 31 Fed. 401; *Braunn v. Keally*, (1892) 146 Pa. 519.

¹ The construction of the "Sunday statutes" which are in force in most of the American states has resulted in some conflict of authority. These statutes commonly prohibit work, labor, and business on Sunday. In such cases a contract to perform work or labor on Sunday is illegal. *Handy v. St. Paul Globe Publishing Co.*, (1889) 41 Minn. 188 [publishing newspaper was held to be a work of necessity in *Pulitzer Pub. Co. v. McNichols*, (1915, Mo.) 181 S.W. 1. See L.R.A., 1916 C, 1148]. Is a contract made on Sunday, but to be performed on a secular day, also illegal? This depends upon whether the courts construe the making of a contract to be work, labor, or business; some courts do, *Reynolds v. Stevenson*, (1853) 4 Ind. 619; *Cranson v. Goes*, (1871) 107 Mass. 439; *Costello v. Ten Eyck*, (1891) 86 Mich. 348; *Troewert v. Decker*, (1881) 51 Wis. 46; some courts do not, *Merritt v. Earle*, (1864) 29 N.Y. 115; *Moore v. Murdock*, (1864) 26 Cal. 514; *Richmond v. Moore*, (1883) 107 Ill. 429. Those courts that do, except the making of a contract for a charitable purpose; *Bryan v. Watson*, (1890) 127 Ind. 42; *Allen v. Duffie*, (1880) 43 Mich. 1; but they are not agreed as to whether there can be a subsequent ratification on a secular day. *Adams v. Gay*, (1847) 19 Vt. 358; *Day v. McAllister*, (1860, Mass.) 15 Gray, 433. Of course the phraseology of a particular statute may be decisive. See generally Ringgold, *Law of Sunday*, (1891); Greenhood, *Public Policy*, pp. 546-556. If the contract made on Sunday has been fully performed, the courts will grant no remedy by way of rescission. *Wilson v. Calhoun*, (1915) 170 Iowa, 111.

tract which has been the frequent subject of legislation, and which from its peculiar character calls for analysis as well as for historical treatment. This is the wager. The word has unfortunately been used as a term of reproach, and often as synonymous with what is popularly known as a "gambling" contract; hence some contracts not permitted by law have been called wagers, while others, precisely similar in their nature but enforced by the courts under certain conditions, are not so called.

240. What is a wager? A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either something given by the other party to abide the event, or a promise to give upon the event determining in a particular way.^{a 1}

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature — that is to say, if an event turns out one way, A will lose, but if it turns out the other way he will win." ^b

There must therefore be mutual chances of gain and loss. But it is to be observed that the event may be uncertain not only because it is a future event, but because it is not yet ascertained, at any rate to the knowledge of the parties. Thus a wager may be made upon the length of St. Paul's, or upon the result of an election which is over, though the parties do not know in whose favor it has gone. The uncertainty then resides in the minds of the parties, and the subject of the wager may be said to be the accuracy of each man's judgment rather than the determination of a particular event.

Conditional promise distinguished. But the parties must con-

^a A so-called bet of £— to nothing might be an offer of reward for the exercise of skill, as if X should bet a jockey £100 to nothing that he did not win a race which X desired him to win; or it might be a gratuitous promise to pay money on a condition, as if X should bet £5 to nothing that it rained in 24 hours.

^b *Thacker v. Hardy*, (1878) 4 Q.B.D. 685, 695; *Richards v. Starck*, [1911] 1 K.B. 296.

¹ The force of the second part of the above definition is well illustrated in cases where premiums or prizes are offered to successful competitors in contests of skill, speed, etc. It is generally held that such transactions are not wagers, although the competitors pay an entrance fee which goes to make up the purse, provided they are not the sole contributors and the transaction is not a subterfuge to cover a wager. *Porter v. Day*, (1888) 71 Wis. 296; *Harris v. White*, (1880) 81 N.Y. 532; *Alvord v. Smith*, (1878) 63 Ind. 58; *Delier v. Plymouth &c. Soc.*, (1881) 57 Iowa, 481; *Hankins v. Ottinger*, (1896) 115 Cal. 454; *Wilkinson v. Stitt*, (1900) 175 Mass. 581. For lottery devices see *Lynch v. Rosenthal*, (1895) 144 Ind. 86; *Dion v. St. John Soc.*, (1890) 82 Me. 319. For numerous illustrations of cases involving wagers see *Greenhood on Pub. Pol.* pp. 222-37.

template the determination of the uncertain event as the sole condition of their contract. One may thus distinguish a genuine wager from a conditional promise or a guarantee.⁶

If *A* promises to paint a portrait of *X* and *X* promises to pay £100 if *M* approves the likeness — this is a contract for the sale of a chattel, the payment to depend upon a condition. *A* agrees to do a piece of work, for which he is to be paid in the uncertain event of *M*'s approval.

If *A*, wishing at the same time to be sure that he gets something, promises *D* to pay him £20 if *M* approves, in consideration that *D* promises to pay *A* £10 if *M* does not approve — this is a wager on the uncertain event of *M*'s decision. *A* bets *D* 2 to 1 that *M* does not approve.¹

Guaranty distinguished. Again, if *A* desires *X* to advance £500 to *M*, and promises that if at the end of three months *M* does not pay he will — this is a promise to answer for the debt or default of another.

If *A*, wishing to secure himself against the possible default of *M*, were to promise *D* to pay him £100 if *M* satisfied his debt at the end of the three months, in consideration that *D* promised him £250 if *M* did not satisfy his debt — this would be a wager upon the solvency of *M*.

241. Marine insurance as a wager. It is obvious that a wager may be a purely gambling or sporting transaction, or it may be directed to commercial objects. A man who bets against his horse winning the Derby is precisely in the same position as a man who bets against the safety of his own cargo. Yet we call the one a wager, while the other is called a contract of marine insurance. *A* has a horse likely to win the Derby, and therefore a prospect of a large return for money laid out in rearing and

⁶ The definition of a wagering contract, cited by Professor Holland (*Jurisprudence*, 302, 11th ed.), in the French Code, Art. 1964 seems faulty. It is said to be "one the effects of which, as to both profit and loss whether for all the parties or for one or several of them, depend on an uncertain event." This would include any agreement in which the profit and loss of one party depended on a contingency.

¹ *A* and *B* agreed to exchange property on terms to be fixed by *X*, and if either refused to abide by *X*'s decision, he should pay the other ten dollars. *A* refused to abide by the decision. It was held that the agreement was one for liquidated damages for breach of contract and not a wager. *Parsons v. Taylor*, (1877, N.Y.) 12 Hun, 252. A condition the happening of which is to increase or decrease the amount of a note or other obligation does not necessarily make the contract an illegal wager. *Phillips v. Gifford*, (1898) 104 Iowa, 458; *Plumb v. Campbell*, (1888) 129 Ill. 101; *Ferguson v. Coleman*, (1846, S.C.) 3 Rich. L. 99; *Gray v. Gardner*, (1821) 17 Mass. 188.

training the horse, in stakes and in bets; he wishes to secure that he shall in no event be a loser, and he agrees with *X* that, in consideration of *X* promising him £4000 if his horse loses, he promises *X* £7000 if his horse wins.

The same is his position as owner of a cargo: he has a prospect of large profits on money laid out upon a cargo of silk; he wishes in no event to be a loser, and he agrees with *X*, an underwriter, that in consideration of his paying *X* a premium of £50, *X* promises to pay him £5000 if his cargo is lost by certain specified perils.

The law forbids *A* to make such a contract unless he has what is called "an insurable interest" in the cargo, and contracts in breach of this rule have been called mere wagers, while those which conform to it have been called contracts of indemnity. But such a distinction is misleading.^a It is not that one is and the other is not a wager: a bet is not the less a bet because it is a hedging bet; nor yet because the stake is limited to the amount of loss sustained; it is the fact that the law permits the one kind of contract and does not permit the other, which makes the distinction between the two.

242. Life insurance as a wager. A contract of life insurance is in like manner a wager. Let us compare it with an undoubted wager of a similar kind. *A* is about to commence his innings in a cricket match, and he agrees with *X* that if *X* will promise to give him £1 at the end of his innings, he will pay *X* a shilling for every run he gets. *A* may be said to insure his innings as a man insures his life; for the ordinary contract of life insurance consists in this, that *A* agrees with the insurance company that if the company will promise to pay a fixed sum on the happening of an event which must happen sooner or later, *A* will pay to the company so much for every year that elapses until the event happens. In each of these cases *A* sooner or later becomes entitled to a sum larger than any of the individual sums which he agrees to pay. On the other hand, he may have paid so many of these sums before the event takes place that he is ultimately a loser by the transaction.¹

243. Wagers at common law. We may leave here the analy-

^a In *Wilson v. Jones*, (1867) L.R. 2 Ex. 139, such a distinction is drawn by Willes and Blackburn, J.J. But though the propriety of a wager may be affected by the existence of an ulterior object in the mind of one of the parties, the nature of the transaction remains the same.

¹ For insurance wagering policies, see *Warnock v. Davis*, (1881) 104 U.S. 775.

sis of a wager, and look at the history of the law respecting wagering contracts.

They fall into two groups: wagers on the happening or ascertaining of an uncertain event, made entirely for sport; and wagers in which the uncertain event affects or results from a business transaction — in other words, hedging bets by which a man protects himself from a trade risk.

I will first deal with sporting wagers, premising that at common law all wagers were enforceable, and, until the latter part of the eighteenth century, were only discouraged by some trifling difficulties of pleading.^{a 1} Thus in 1771 Lord Mansfield heard without protest an action on a wager made at Newmarket by which two young men agreed "to run their fathers (to use the phrase of that place) each against the other"; that is, to bet on the duration of their fathers' lives.^b It so happened that the father of one of them was (unknown to either) already dead, and the arguments in the case were solely concerned with the question whether a term was to be implied in the contract analogous to the "lost or not lost" of a marine-insurance policy.

But as the courts found that frivolous or indecent matters were brought before them for decision, rules came to be established that a wager was not enforceable if it could only be proved by evidence which was indecent or was calculated to injure or pain a third person;² or, as a matter of public policy, that any wager which tempted a man to offend against the law was illegal.

Strange and even ludicrous results followed from these efforts of the courts to discourage the litigation of wagers. A bet upon the duration of the life of Napoleon was held to be a contract which the courts would not enforce, as tending, on the one side, to weaken the patriotism of an Englishman, on the other, to en-

^a *Jackson v. Colegrave*, (1804) *Carthew*, p. 338.

^b *March v. Pigot*, (1771) 5 *Burr*. 2802.

¹ In the United States some courts have followed the English law in holding wagers legal unless prohibited by statute, or, for special reasons, promotive of improper results. *Campbell v. Richardson*, (1813, N.Y.) 10 *Johns.* 406; *Trenton &c. Ins. Co. v. Johnson*, (1854) 24 *N.J. L.* 576; *Beadles v. Bless*, (1862) 27 *Ill.* 320. But the strong tendency is to declare all wagers (save those for commercial objects) contrary to public policy and void. *Love v. Harvey*, (1873) 114 *Mass.* 80; *Bernard v. Taylor*, (1893) 23 *Ore.* 416; *Eldred v. Malloy*, (1874) 2 *Colo.* 320; *Wilkinson v. Tousley*, (1871) 16 *Minn.* 299; *Irwin v. Williar*, (1884) 110 *U.S.* 499.

² *Da Costa v. Jones*, (1778) 2 *Cowp.* 729 (a bet as to the sex of Chevalier D'Eon).

courage the idea of the assassination of a foreign ruler, and so to provoke retaliation upon the person of our own sovereign. But it is evident that the substantial motive which pressed upon the judges was "the inconvenience of countenancing idle wagers in courts of justice," the feeling that "it would be a good rule to postpone the trial of every action upon idle wagers till the court had nothing else to attend to." ^a

244. English legislation.¹ The legislature had however dealt with certain aspects of wagering contracts. It was enacted by 16 Car. II, c. 7, that any sum exceeding £100 lost in playing at games or pastimes, or in betting on the players, should be irrecoverable, and that all forms of security given for money so lost should be void. The law was carried a stage further by 9 Anne, c. 14, whereby securities of every kind, whether given for money lost in playing at games, or betting on the players, or knowingly advanced for such purposes, were rendered wholly void; and the loser of £10 or more was enabled to recover back money so lost and paid, by action of debt brought within three months of payment.

It will be observed that these two Acts dealt with wagers on "games and pastimes" (which include horse-racing), and did not affect what may be conveniently called sporting wagers of other kinds, such as a

^a *Gilbert v. Sykes*, (1812) 16 East, 150, 162.

¹ Gambling contracts are by statute illegal and void in most American states. Statutes of this sort are very obviously not intended to invalidate insurance contracts or other contracts of an aleatory character for beneficial purposes; but they do not afford any plain test for separating the sheep from the goats. Stimson, *Am. St. Law*, § 4132. Most states have constitutional prohibitions against legalizing lotteries. *Ibid.*, § 426. In New York the legislature is forbidden to legalize any kind of gambling. *Const.*, (1895) Art. 1, § 9.

Money paid or property delivered upon a gambling consideration may generally be recovered. Stimson, *Am. St. Law*, § 4132. See 14 *Am. & Eng. Encyc. of Law* (2d ed.), pp. 614-628 for recovery from the other party, and pp. 631-36 for recovery from the stakeholder.

In some states negotiable instruments given in payment of wagers are void. Stimson, § 4132. In many they are valid in the hands of a *bona fide* holder for value, but he has the burden of proving that he is such a holder. *Ibid.* Other securities, including judgments by confession or default, are generally void altogether. Stimson, § 4132. See 14 *Am. & Eng. Encyc. of Law* (2d ed.), pp. 644-650.

In the absence of special statutory provisions, money loaned to enable a loser to pay a loss incurred in gambling may be recovered. 14 *Am. & Eng. Encyc. of Law* (2d ed.), p. 642. So money loaned with knowledge that it is to be used to make a wager may nevertheless be recovered; but not if it is loaned with the understanding and intent that it should be so used. *Ibid.*, p. 641; *Tyler v. Carlisle*, (1887) 79 Me. 210.

An agent may not recover commissions and advances for services in gambling transactions of the nature of which he is aware. *Ibid.*, p. 640; *Harvey v. Merrill*, (1839) 150 Mass. 1.

wager on the result of a contested election.^a It will be seen hereafter that the distinction is still of importance.

Cases of hardship resulted from the working of this act. Securities might well be purchased from the holders of them by persons ignorant of their illegal origin. These persons, when they sought to enforce them against the giver of the security, discovered, too late, that they had paid value for an instrument which was by statute wholly void as against the party losing at play. The Gaming Act of 1835, 5 & 6 Will. IV. c. 41 therefore enacted that securities which would have been void under the Act of Anne should henceforth be deemed to have been made, drawn, or accepted for an illegal consideration. The holder of such an instrument may therefore enforce it, even after proof of its illegal inception, if he is able to show that he gave value for it and was ignorant of its origin: in other words — that he was a *bona fide holder for value*.

The next step was to make wagers of all kinds void: this was done by the Gaming Act of 1845, § 18 (8 & 9 Vict. c. 109), which enacts:

"That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

But it will be noticed that this Act does not affect the distinction between wagers on games and pastimes and other wagers *so far as concerns securities given in respect of each class of wager*. Securities given in respect of wagers on games and pastimes are still (by reason of the Act of 1835) deemed to be given on an illegal consideration; but since the Gaming Act of 1845, securities given in respect of other wagers are given in respect of contracts which the Act makes *void*; that is to say, they are given for no consideration at all.

It remained to deal with agreements arising out of wagers or made in contemplation of them. Wagers were only *void*, so that no taint of illegality attached to transactions collateral to wagers, except in the case of securities given for payment of money due in respect of those on games and pastimes. Money lent to make or to pay bets could be recovered, and if one man employed another to make bets for him the ordinary rules prevailed which govern the relation of employer and employed.^b

The Gaming Act of 1892 (55 Vict. c. 9) alters the law in this last respect.

"Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connection there-

^a *Woolf v. Hamilton*, [1898] 2 Q.B. (C.A.) 238.

^b *Wettenhall v. Wood*, (1793) 1 Esp. 17; *Pyke's case*, (1878) 8 Ch. D. 756.

with, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

A man cannot now recover commission or reward promised to him for making or for paying bets: nor can he recover money paid in discharge of the bets of another. Whether he is a betting commissioner who pays the bets which he has been employed to make and, if lost, to pay: or whether, on request, he settles the accounts of a friend who has lost money at a race-meeting, he cannot successfully sue for money so paid.^a

The Court of Appeal has held that money knowingly lent to pay bets is not money paid "in respect of" a contract rendered null and void by the Gaming Act of 1845;^b but whether money lent for the purpose of making bets is to be similarly regarded is as yet undecided. It seems however that there is no difference between the two cases, and that the Gaming Act of 1892 does not apply. The language of the court in *Sazby v. Fulton*^c supports this view, though the decision itself turned on the liability to repay money lent for gaming in a country where gaming is lawful.^d

Carney v. Plimmer^e is certainly no authority to the contrary. Plimmer, wishing to deposit £500 with a stakeholder for the purpose of a wager, borrowed £500 from Carney, on the terms that he was to repay the money if he won, but not otherwise. He won but refused to pay, and it was held that the transaction was not a simple loan of money, but money paid "in respect of" a wager.

It is clear, however, that one who is employed to make bets on behalf of another and who receives the winnings cannot keep them. This is money received on behalf of another, and is not within the Act.^f

And money deposited with a stakeholder to abide the event of a wager is not money "paid." For the word "paid" is interpreted to mean "paid out and out," and the deposit can be recovered by the depositor at any time before it has been paid away on the determination of the bet.^g

The Act of 1845 repealed the Acts of Charles II and Anne, so that, apart from Acts forbidding lotteries and certain games, and Acts regulating insurance, we now have three statutes relating to wagers — the Gaming Act of 1835,^h as to securities given for money lost on certain kinds of wager; the Gaming Act of 1845,ⁱ as to wagers in general, the Gaming Act of 1892,^j as to collateral transactions, other than securities, arising out of wagers.

It has been pointed out that securities given for money lost on wagers still fall into two classes, because the Gaming Act of 1835 retains the distinction between wagers in respect of games and pastimes and other wagers.

^a *Saffery v. Mayer*, [1901] 1 K.B. (C.A.) 11.

^b *Re O'Shea*, [1911] 2 K.B. 981.

^c [1909] 2 K.B. at p. 232.

^d See also an article by Mr. Dicey in the *Law Quarterly Review*, 1904, p. 436. It must be remembered, however, that money lent for playing at an *illegal and prohibited* game, such as *hasard* (as distinguished from a loan to make a wager which is *void* under the Gaming Act of 1845) cannot be recovered.

^e [1897] 1 Q.B. 634; and see *Richards v. Starck*, [1911] 1 K.B. 296.

^f *De Mattos v. Benjamin*, (1894) 63 L.J. (Q.B.) 248.

^g *Burge v. Ashley & Smith, Ltd.*, [1900] 1 Q.B. (C.A.) 744.

^h 5 & 6 Will. IV, c. 41.

ⁱ 8 & 9 Vict. c. 100.

^j 55 Vict. c. 9.

Thus a promissory note given in payment of a bet made upon a cricket match is deemed to be given for an illegal consideration; not only is it void as between the original parties to it, but every subsequent purchaser may be called on to show that he gave value for the note and knew nothing of the illegal consideration for which it was first given.

On the other hand, a promissory note given in payment of a wager upon the result of a contested election would, as between the parties to it, be given for no consideration at all, inasmuch as it is given in discharge of an obligation which does not exist, and is not deemed to be given for an illegal, or for any, consideration. If, therefore, the note be endorsed over to a third party, it matters nothing that he was aware of the circumstances under which the note was originally given; and it is presumed in his favour that he gave value for the note, until the contrary is shown.^a

245. Commercial wagers. As regards wagering contracts entered into for commercial purposes, there are three important subjects with which the Legislature has dealt. These are Stock Exchange transactions, marine insurance, and insurance upon lives or other events.

Stock Exchange transactions. The "infamous practice of stockjobbing" and particularly wagers on the price of stock or "agreements to pay differences," were dealt with by Sir John Barnard's Act, 1734,^b which is now repealed. Contracts of this kind, if wagers and nothing more, fall within the Gaming Act of 1845. Suppose that A contracts with X for the purchase of fifty Russian bonds at £78 for every £100 bond. The contract is to be executed on the next settling day. If by that date the bonds have risen in price, say to £80, X, unless he has the bonds on hand, must buy at £80 to sell at £78; and if he has them on hand, he is obliged to part with them below their market value. If, on the other hand, the bonds have gone down in the market, A will be obliged to pay the contract price which is in excess of the market value.

It is easy to see that such a transaction may be a wager and nothing more, a bet on the price of stock at a future day. A may never intend to buy nor X to sell the bonds in question; they may intend no more than that the winner should receive from the loser the difference between the contract price and the market value on the settling day.¹ On the other hand A may have intended to buy, and have found so much better an investment

^a *Fitch v. Jones*, (1855) 5 E. & B. 245.

^b 7 Geo. II, c. 8.

¹ For explanations of "futures," "options," "puts," "calls," "straddles," and other stock exchange terms, and for statutory provisions, see 14 Am. & Eng. Encyc. of Law (2d ed.), pp. 605-608.

for his money between the date of the contract and the settling day that it is well worth his while to agree to pay a difference in X's favor to be excused performance of the contract.^{a 1}

If the transaction is essentially an agreement to pay differences, and is found to be so as a fact, a term in the wagering contract that either party may at his option require completion of the purchase will not alter the character of the transaction. Such a term is said to be inserted only to "cloak the fact that it was a gambling transaction and to enable the parties to sue one another for gambling debts."^b Money due to one of the parties on such an agreement cannot be recovered, but securities deposited with one of the parties to provide for debts arising from a series of agreements to pay differences may be recovered by the depositor on the ground that there was no consideration for the deposit, since the agreements, the performance of which was to be secured, were themselves void.^c

Marine insurance. Marine insurance is now dealt with by the Insurance Act of 1906,^d the effect of which is to avoid all insurances on ships or merchandise, if the person effecting the in-

^a *Thacker v. Hardy*, (1878) 4 Q.B.D. 685.

^b *Universal Stock Exchange v. Strachan*, [1896] A.C. 173.

^c *Re Cronmire*, [1898] 2 Q.B. 333.

^d 6 Edw. VII, c. 41, § 4.

¹ Wagers on the future price of a commodity, where the understanding is that no delivery is to be made but that there shall be a mere "settlement of differences," are illegal. *Raymond v. Parker*, (1911) 85 Conn. 694; *Lamson v. Bane*, (1913, C.C.A.) 206 Fed. 253; *Mohr v. Miesen*, (1891) 47 Minn. 228; *Harvey v. Merrill*, (1889) 150 Mass. 1. But an agreement for future sale and delivery, though the purchase is on a margin, or includes an option, is not necessarily illegal. *Assigned estate of L. H. Taylor & Co.*, (1899) 192 Pa. 304. In the absence of special statutory provisions, these and other cases support the following conclusions: (1) Contracts for future delivery are valid, whether the seller has the goods or not; (2) option contracts, whether "puts," "calls," or "straddles," are not *per se* gambling contracts; (3) purchase and sale on margin is lawful; (4) where there is nothing on the face of the contract to show that it is a wagering contract, it will be presumed to be valid and the burden of proving its illegality is upon him who alleges it; (5) its illegality is shown by satisfactory proof that neither party intended an actual sale followed by delivery, but intended a settlement of the difference between the contract price and the future market price in money; (6) if one party intends actual delivery, but the other intends a settlement of differences, the contract may be enforced at the option of the one intending delivery; *Pixley v. Boynton*, (1875) 79 Ill. 351; (7) if neither party intends delivery but both afterward agree upon actual delivery, the new contract is valid; (8) if both parties intend delivery they may afterward discharge the contract by a settlement of differences. *Bigelow v. Benedict*, (1877) 70 N.Y. 202; *Story v. Salomon*, (1877) 71 N.Y. 420; *Roundtree v. Smith*, (1883) 108 U.S. 269. And see 14 Am. & Eng. Encyc. of Law (2d ed.), pp. 606-612, 620-621; *Irwin v. Williar*, (1884) 110 U.S. 499.

surance has no "interest," actual or contingent, in the thing insured, or if the policy contains words which make proof of interest unnecessary. Section 4 (2) of the Act provides in terms that a contract of marine insurance where the assured has no such interest shall be "deemed to be a gaming or wagering contract." And by a later Act,^a it has been made a criminal offense to effect a contract of marine insurance without a *bona fide* interest or expectation of an interest in the subject-matter of the insurance. What is an insurable interest, that is to say such an interest as entitles a man to effect an insurance, is a question of mercantile law with which we are not here concerned; but the reader may be referred to §§ 5-14 of the Marine Insurance Act.¹

Insurance generally. The Act 14 Geo. III, c. 48 deals with insurance generally (marine insurance excepted), and forbids insurances on the lives of any persons, or on any events whatsoever in which the person effecting the insurance has no interest. It further requires that the names of the persons interested should be inserted in the policy, and provides that no sum greater than the interest of the insured at the time of insurance should be recovered by him. A creditor may thus insure the life of his debtor, and a lessee for lives may insure the lives upon which the continuance of his lease depends.

Life insurance. But life insurance differs in an important respect from marine or fire insurance. These latter are contracts, not to pay a specified sum on the happening of a particular event, but to *indemnify* the assured against damage caused by an event insured against, up to a certain limit;^b within that limit, the sum payable will vary according to the loss sustained. But the assured is not permitted to make a profit out of his misfortune, and therefore if he recovers the amount of his loss from any other source the insurer may recover from him *pro tanto*;^c

^a 9 Edw. VII, c. 12.

^b *Darrell v. Tibbitts*, (1880) 5 Q.B.D. 500.

^c This right is called the "subrogation" of the insurer into the rights of the insured: it is most fully and clearly discussed in *Castellain v. Preston*, (11 Q.B.D. 380). The insurer is not merely entitled to be put in the place of the insured for the purpose of enforcing rights of action, but to have the advantage of every right of the insured by which the loss has been or can be diminished. The purpose of the doctrine is to prevent these contracts from being anything but contracts of indemnity.

¹ A few of the American states held marine insurance policies valid though the insured had no insurable interest. *Buchanan v. Ins. Co.*, (1826, N.Y.) 6 Cow. 318, and see *Trenton &c. Ins. Co. v. Johnson*, (1854) 24 N.J. L. 576. But the strong tendency has been to hold illegal all wagering contracts upon matters in which the parties have no interest. *Ante*, § 243, note. Such contracts are now generally forbidden by statute. For a discussion of the meaning of the term "insurable interest," see Greenhood, *Public Policy*, pp. 238-91.

and if he has renounced rights which he might have exercised, and which if exercised would have relieved the insurer, he may be compelled to make good to the insurer the full value of those rights.^a

"Policies of insurance against fire or marine risk are contracts to recoup the loss which parties may sustain from particular causes. When such loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. The policy never refers to the reason for effecting it. It is simply a contract that in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid, in order to purchase the postponed payment."^b

Thus, though in a life policy the insured is required to have an interest when the insurance is effected,^c that interest is nothing as between him and the company who are the insurers. "The policy never refers to the reason for effecting it." The insurer promises to pay a large sum on the happening of a given event, in consideration of the insured paying lesser sums at stated intervals until the happening of the event. Each takes his risk of ultimate loss, and the statutory requirement of interest in the insured is no part of the contract. And so if a creditor effects an insurance on his debtor's life, and afterwards gets his debt paid, yet still continues to pay the insurance premiums, the fact that the debt has been paid is no answer to the claim which he may have against the company. Lord Ellenborough had treated life insurance as a contract of indemnity,^d but in *Dalby v. The India and London Life Assurance Company*,^e the rule above stated was finally established.¹

In other words, fire and other insurance of the kind is a contract to pay in an event which may or may not happen; life in-

^a *West of England Fire Ins. Co. v. Isaacs*, [1897] 1 Q.B. 226.

^b *Law v. London Indisputable Life Policy Co.*, (1855) 1 K. & J. 228.

^c 14 Geo. III, c. 48, § 2.

^d See *Godsall v. Boldero*, (1807) 9 East, 72.

^e (1854) 15 C.B. 365.

¹ *Accord*: *Corson's Appeal*, (1886) 113 Pa. 438; *Rittler v. Smith*, (1889) 70 Md. 281. But if the policy be grossly in excess of the debt the contract may be regarded as a wager. *Cammack v. Lewis*, (1872, U.S.) 15 Wall. 643; *Cooper v. Shaeffer*, (1887, Pa.) 11 Atl. 548. So, also, if one having an insurable interest take out a policy in good faith and assign it to one not having an insurable interest, the latter may recover the full amount of the policy. *Steinback v. Diepenbrock*, (1899) 158 N.Y. 24; *Clark v. Allen*, (1877) 11 R.I. 439; *Mutual Life Ins. Co. v. Allen*, (1884) 138 Mass. 24; *Martin v. Stubbings*, (1888) 126 Ill. 387. *Contra*: *Warnock v. Davis*, (1881) 104 U.S. 775; *Basye v. Adams*, (1883) 81 Ky. 368.

surance is a contract to pay in an event which must happen sooner or later. In the first the uncertainty is not *when* but *whether* that event will occur; in the second the uncertainty is solely *when* it will occur.

2. *Contracts illegal at common law*

(a) *Agreements to commit an indictable offense or civil wrong*

246. Agreement to commit a crime or wrong. It is plain that the courts would not enforce an agreement to commit an act which is criminal at common law or by statute.

Nor again will the courts enforce an agreement to commit a tort.

An agreement to commit an assault has been held to be void, as in *Allen v. Rescous*,^a where one of the parties undertook to beat a man. So too has an agreement involving the perpetration of a fraud;^{b 1} or the publication of a libel; or even a promise by a newspaper proprietor to indemnify the printers of the newspaper against the risk of libel actions.^{c 2}

A debtor making a composition with his creditors of 6s. 8d. in the pound, entered into a separate contract with the plaintiff to pay him a part of his debt in full. This was held to be a fraud on the other creditors, each of whom had promised to forego a portion of his debt in consideration that the others would forego theirs in a like proportion. "Where a creditor in fraud of the agreement to accept the composition stipulates for a preference to himself, his stipulation is altogether void."^{d 3} On the same

^a (1675) 2 Lev. 174.

^b *Clay v. Yates*, (1856) 1 H. & N. 73.

^c *Smith v. Clinton*, (1906) 25 T.L.R. 34. ^d *Mallalieu v. Hodgson*, (1851) 16 Q.B. 689.

¹ *Materne v. Horwitz*, (1886) 101 N.Y. 469; *Merrill v. Packer*, (1890) 80 Iowa, 542; *Church v. Proctor*, (1895) 66 Fed. 240; *Randall v. Howard*, (1862) 67 U.S. 585; *Wanderer's Hockey Club v. Johnson*, (1913) 18 Brit. Col. 367, 25 West. L.R. 434 (contract the purpose of which is to induce a breach of a contract with a third person); *Rhoades v. Malta Vita Co.*, (1907) 149 Mich. 235 (same); *Ebert v. Haskell*, (1914) 217 Mass. 209 (contract to induce an agent to conceal a fact from his principal); *Smith v. Crockett Co.*, (1912) 85 Conn. 282 (same); *McNair v. Parr*, (1913) 177 Mich. 327 (contract between family doctor and a surgeon to split the fee).

² *Contra*, *Jewett Pub. Co. v. Butler*, (1893) 159 Mass. 517.

³ *White v. Kunts*, (1887) 107 N.Y. 518; *Kullman v. Greenebaum*, (1891) 92 Cal. 403; *Cheveront v. Textor*, (1879) 53 Md. 295; *Brown v. Nealley*, (1894) 161 Mass. 1; *Crossley v. Moore*, (1878) 40 N.J.L. 27; *Tinker v. Hurst*, (1888) 70 Mich. 159. It has been held that such a stipulation prevents the preferred creditor from enforcing the composition agreement also; *Frost v. Gage*, (1862, Mass.) 3 Allen, 560; the better rule seems to be *contra*: *Hanover Bank v. Blake*, (1894) 142 N.Y. 404.

ground the courts will not support a condition in a contract that in the event of a man's becoming bankrupt certain articles of his property should be taken from his creditors and go to the promisee.^a

An agreement forming part of a scheme for promoting a company, in which the object of the promoters was to defraud the shareholders, will not furnish a cause of action.¹ A purchased from X an exclusive right to use a particular scientific process; it turned out that X had no such right as he professed to sell: but A could not recover back the purchase money he had paid to X because the agreement was shown to have been made in contemplation of a fraud.^b

We may perhaps also classify under this head a case where newspaper proprietors, who purported to give in their journal honest advice to intending purchasers of Canadian land, nevertheless for a valuable consideration promised a person interested in Canadian land companies not to publish any comments on any land company with which he might be connected. It was held that an agreement which would prohibit them from warning the public even against a fraudulent or dishonest scheme was against public policy.^c

247. Fraud and illegality. Fraud is a civil wrong, and an agreement to commit a fraud is an agreement to do an illegal act. But fraud as a civil wrong must be kept apart from fraud as a vitiating element in contract.

If A is induced to enter into a contract with X by the fraud of X, the contract is *voidable* because this sufficiently protects A, and if A does not discover the fraud in time to avoid the contract he may still sue in *tort* for such damage as he has sustained. If A and X make a contract the object of which is to defraud M the contract is *void*, because A and X have agreed to do what is illegal. A power of avoidance in the injured party is a sufficient remedy in the first case but is not in the second.

^a *Ex parte Barter*, (1884) 26 Ch. D. 510.

^b *Begbie v. Phosphate Sewage Co.*, (1875) L.R. 10 Q.B. at p. 499.

^c *Neville v. Dominion of Canada News Co.*, [1915] 3 K.B. 556.

¹ *Greater Pittsburgh &c. Co. v. Riley*, (1904) 210 Pa. 283; *Noel v. Drake*, (1882) 28 Kans. 265. See *Kantzier v. Bensinger*, (1905) 214 Ill. 589. A contract by a corporate shareholder to vote in a certain way for a consideration paid to him is illegal as being a fraud on other shareholders. *Guernsey v. Cook*, (1876) 120 Mass. 501; *Palmbaum v. Magulsky*, (1914) 217 Mass. 306; *Timme v. Kopmeier*, (1916) 162 Wis. 571; Cf. *Kregor v. Hollins*, (Ct. App. 1913) 109 L.T.R. 225, sustaining a contract involving similar considerations on the ground that all the other interested parties consented to it.

(b) *Agreements to do that which it is the policy of the law to prevent*

248. **Public policy.** The policy of the law, or public policy, is a phrase of common use in estimating the validity of contracts. Its history is obscure; it is most likely that agreements which tended to restrain trade or to promote litigation were the first to elicit the principle that the courts would look to the interests of the public in giving efficacy to contracts. Wagers, while they continued to be legal, were a frequent provocative of judicial ingenuity on this point, as is sufficiently shown by the case of *Gilbert v. Sykes*^a quoted already: but it does not seem probable that the doctrine of public policy began in the endeavor to elude their binding force.^b Whatever may have been its origin, it was applied very frequently, and not always with the happiest results, during the latter part of the eighteenth and the commencement of the nineteenth century.^c Modern decisions, however, while maintaining the duty of the courts to consider the public advantage, have tended more and more to limit the sphere within which this duty may be exercised. The principle is thus stated by Jessel, M.R., in 1875: "You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract";^d and in 1902 it was expressly laid down in the House of Lords that public policy was a dangerous guide in determining the validity of a contract.^e

We may say however that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules, but at the same time the application of these to particular instances necessarily varies with the progressive development of public opinion and morality.^f We may arrange the contracts which the courts will not enforce because contrary to the policy of the law under certain heads.

249. **Agreements which injure the state in its relations with other states.** These fall under two heads, friendly dealings with a hostile state, and hostile dealings towards a friendly state.

Not only is it unlawful to enter into contracts with an alien

^a (1812) 16 East, 180.

^b Sir Frederick Pollock (*Contract*, 8th ed., p. 328) holds that the discouragement of wagers was the foundation of the doctrine of "public policy"; but restraint of trade has a prior claim: see *Year Book*, 2 Hen. V, pl. 26, and the comment of Lord St. Leonards in *Egerton v. Earl Brownlow*, (1853) 4 H.L.C. p. 237.

^c *Egerton v. Earl Brownlow*, (1853) 4 H.L.C. 1.

^d *Printing Co. v. Sampson*, (1874) 19 Eq. 465.

^e *Jamson v. Driefontein Consolidated Gold Mines*, [1902] A.C. 484.

^f *Wilson v. Carnley*, [1908] 1 K.B. at p. 738.

enemy, but it is unlawful to purchase goods in an enemy's country without license from the Crown. Thus in the case of *Esposito v. Bowden*^a a contract of charter-party, in which an English subject chartered a neutral ship to bring a cargo of corn from Odessa, was avoided by the outbreak of hostilities between England and Russia.

"For a British subject (not domiciled in a neutral country) to ship a cargo from an enemy's port, even in a neutral vessel, without license from the Crown, is an act *prima facie* and under all circumstances a dealing and trading with the enemy, and therefore forbidden by law."

We must note that hostilities must actually have broken out; a contract made with an alien, whose government subsequently declares war, is actionable, if the breach occurs before war is declared, even though it be made in view of the possibility of war.^b

But the sovereign who has the power to proclaim war may, by order in council, suspend the effect of such proclamation for a time so as to allow the performance of subsisting contracts within that time.¹

An agreement which contemplates action hostile to a friendly state is unlawful and cannot be enforced. So the courts will afford no assistance to persons who "set about to raise loans for subjects of a friendly state to enable them to prosecute a war against their sovereign."^{c 2}

There seems no authority as to the lawfulness of a contract to break the law of a foreign country beyond the opinion of writers on the subject that such a contract could not be enforced.^d Nor does there seem to be trustworthy authority for a *dictum* of Lord Mansfield that "no country ever takes notice of the revenue laws of another."^e It must be considered very doubtful whether

^a (1857) 7 E. & B. 763.

^b *Janson v. Driefontein Consolidated Gold Mines*, [1902] A.C. 484.

^c *De Wits v. Hendricks*, (1824) 2 Bing. 316.

^d In one or two cases where a party to a contract involving a possible breach of a foreign law has been prevented from fulfilling his obligation under it by the foreign law, the courts have treated the contract as discharged as being impossible of performance by reason of *vis major*: see *Ford v. Cotesworth*, (1870) L.R. 5 Q.B. 544; *Cunningham v. Dunn*, (1878) 3 C.P.D. 443.

^e *Holman v. Johnson*, (1775) Cowp. 343.

¹ Contracts with alien enemies which involve any communication across the lines of hostilities are illegal. *United States v. Grossmayer*, (1869, U.S.) 9 Wall. 72; *Kershaw v. Kelsey*, (1868) 100 Mass. 561; *Woods v. Wilder*, (1870) 43 N.Y. 164; and a contract may be utterly discharged, if the outbreak of war makes further performance illegal. *Zinc Corp. v. Hirsch*, [1916] 1 K.B. 541.

² *Pond v. Smith*, (1822) 4 Conn. 297; *Kennett v. Chambers*, (1852, U.S.) 14 How. 38.

an agreement to break the revenue laws of a friendly state would now furnish a cause of action.¹

250. **Agreements tending to injure the public service.** The public has an interest in the proper performance of their duty by public servants, and is entitled to be served by the fittest persons procurable. Courts of law hold contracts to be illegal which have for their object the sale of public offices or the assignment of the salaries of such offices.²

In *Card v. Hope*,^a which is perhaps an extreme case, a deed was held to be void by which the owners of the majority of shares in a ship sold a portion of them, the purchaser acquiring the command of the ship for himself and the nomination to the command for his executors. The ship was in the service of the East India Company, and this had been held equivalent to being in the public service,^b but the judgment proceeded on the ground that the public had a right to the exercise by the owners of *any* ship of their best judgment in selecting officers for it. The public has a right to demand that no one shall be induced merely by considerations of private gain to enter or refrain from entering its service.^c

Thus what has been called "the policy of the law" will not uphold a disposition of property made upon the condition that

^a (1824) 2 B. & C. 661.

^b *Blackford v. Preston*, (1799) 8 T.R. 89.

^c 5 & 6 Ed. VI, c. 16; 49 Geo. III, c. 126.

¹ Contracts looking to the breach of the laws of a sister state of the Union are illegal. *Graves v. Johnson*, (1892) 156 Mass. 211, and note in 15 L.R.A. 834.

² The following contracts are illegal: agreements to appoint to public office, *Robertson v. Robinson*, (1880) 65 Ala. 610; to sell, procure, or exchange a public office, *Martin v. Royster*, (1847) 8 Ark. 74; *Meguire v. Corwine*, (1879) 101 U.S. 108; *Stroud v. Smith*, (1872, Del.) 4 Houst. 448; or any position of trust and confidence, *Forbes v. McDonald*, (1880) 54 Cal. 98; *West v. Camden*, (1890) 135 U.S. 507; *Guernsey v. Cook*, (1876) 120 Mass. 501; to share the emoluments of an office, *Martin v. Wade*, (1869) 37 Cal. 168; *Gray v. Hook*, (1851) 4 N.Y. 449; to serve in office at less than the statutory salary, *State v. Collier*, (1880) 72 Mo. 13; *Brown v. Bank*, (1893) 137 Ind. 655; *Peters v. Davenport*, (1898) 104 Iowa, 625; to influence legislative action by "lobbying," *Trist v. Child*, (1874, U.S.) 21 Wall. 441; *Owens v. Wilkinson*, (1902) 20 App. D.C. 51; to influence executive action improperly, *Prov. Tool Co. v. Norris*, (1864, U.S.) 2 Wall. 45; *Oscanyan v. Arms Co.*, (1880) 103 U.S. 261 [but see *Lyon v. Mitchell*, (1867) 36 N.Y. 235; *Southard v. Boyd*, (1872) 51 N.Y. 177]; to influence corporate or other fiduciary action, *Woodstock Iron Co. v. Richmond &c. Co.*, (1888) 129 U.S. 643; to quiet competition for public contracts, *Brooks v. Cooper*, (1893) 50 N.J. Eq. 761; *Boyle v. Adams*, (1892) 50 Minn. 255; to aid the election of a candidate contrary to the convictions of the one so aiding, *Nichols v. Mudgett*, (1860) 32 Vt. 546; to give a consent required by law, *Greer v. Severson*, (1903) 119 Iowa, 84.

the holder should procure a title of honor;^a or that he should never enter the naval or military service of the Crown;^b and an agreement whereby a member of Parliament in consideration of a salary paid to him by a political association agreed to vote on every subject in accordance with the directions of the association, would be invalid for the same reason.^c

On a somewhat different principle the same rule applies to the assignment of salaries or pensions. "It is fit," said Lord Abinger in *Wells v. Foster*,^d "that the public servants should retain the means of a decent subsistence without being exposed to the temptations of poverty." And in the same case, Parke, B., lays down the limits within which a pension is assignable. "Where a pension is granted, not exclusively for past services, but as a consideration for some continuing duty or service, then, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that should be assignable."^e 1

251. Agreements which tend to pervert the course of justice. These most commonly appear in the form of agreements to stifle prosecutions, as to which Lord Westbury said, "You shall not make a trade of a felony. If you are aware that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself."^f 2

An exception to this rule is found in cases where civil and criminal remedies coexist: a compromise of a prosecution is then permissible. The exception and its limits are thus stated in the case of *Keir v. Leeman*:¹

"We shall probably be safe in laying it down that the law will permit a compromise of all offenses though made the subject of a criminal

^a *Egerton v. Brownlow*, (1853) 4 H.L.C. 1.

^b *Re Beard*, [1908] 1 Ch. 383.

^c *Osborne v. Amalgamated Soc. of Railway Servants*, [1910] A.C. 87.

^d (1841) 8 M. & W. 151.

^e *Williams v. Bayley*, (1866) L.R. 1 H.L. 200, 220.

^f (1844) 6 Q.B. 321, and see (1846) 9 Q.B. 395.

¹ Unearned public salaries cannot be assigned; *Bangs v. Dunn*, (1884) 66 Cal. 72; *State v. Williamson*, (1893) 118 Mo. 146; *Bowery Nat. Bk. v. Wilson*, (1890) 122 N.Y. 478; *Granger v. French*, (1908) 152 Mich. 356; nor the unearned fees of an executor, *Matter of Worthington*, (1894) 141 N.Y. 9. Pensions granted by the United States to soldiers and sailors are by statute unassignable. U.S. Rev. St. § 4745; but as to attachment in pensioner's hands see *McIntosh v. Aubrey*, (1902) 185 U.S. 122.

² *Partridge v. Hood*, (1876) 120 Mass. 403; *McKenzie v. Lynch*, (1911) 167 Mich. 583; *Haynes v. Rudd*, (1886) 102 N.Y. 372; *Insurance Co. v. Hull*, (1894) 51 Ohio St. 270; *Graham v. Hiesel*, (1905) 73 Neb. 433. But a prosecuting officer may agree to dismiss a prosecution in consideration of the accused giving testimony against other offenders. *Nickelson v. Wilson*, (1875) 60 N.Y. 362.

prosecution, for which offenses the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offense is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it."

This statement of the law was adopted in 1890 by the Court of Appeal.^{a 1}

Another example of this class of agreements is an indemnity given to one who has gone bail for an accused person, whether such indemnity be given by the prisoner himself, as in *Hermann v. Jeuchner*,^b or by a third person on his behalf, as in the later case of *Consolidated Exploration Company v. Musgrave*.^{c 2}

Agreements to refer matters in dispute to arbitration have been regarded as attempts to "oust the jurisdiction of the courts," and as such were limited in their operation by judicial decisions.^d

The rules on the subject are now consolidated in the Arbitration Act, 1889,^e and govern "a submission" that is, "a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not."

251a. Arbitration agreements in the United States.³ It may well be questioned whether there is anything contrary to public policy in contracts providing for the arbitration of disputes to the exclusion of the courts. As a method of settling such disputes, court litigation cannot be said to be markedly superior to arbitration, nor is it likely to be made so by arbitrary rules discouraging the latter. Indeed, it may be the active competition of administrative boards and private arbitration that will cause the bench and bar to develop a more efficient court procedure.

Arbitration agreements may be classified in two ways: (1) they may be general in scope covering all possible controversies or they may be limited to one or more specific questions; (2) they may make an award an express condition precedent to any contract right or the agreement to arbitrate may be wholly independent and collateral.

^a *Windhill Local Board v. Vint*, (1890) 45 Ch. D. (C.A.) 351.

^b (1885) 15 Q.B.D. 561.

^c [1900] 1 Ch. 37.

^d *Scott v. Avery*, (1856) 5 H.L.C. 811; *Edwards v. Aberayron Insurance Society*, (1875) 1 Q.B.D. 596.

^e 52 & 53 Vict. c. 49.

¹ *Nickelson v. Wilson*, *supra*; *Geier v. Shade*, (1885) 109 Pa. 180. But *contra*: *Partridge v. Hood*, *supra*; *Corbett v. Clute*, (1905) 137 N.C. 546.

² *Contra*: *Moloney v. Nelson*, (1896) 158 N.Y. 351. The authorities are reviewed in s.c. 12 N.Y. App. Div. 545.

³ By the American editor.

Agreements providing for the arbitration of all possible future disputes that may arise concerning the subject-matter, to the exclusion of the courts, have been held to be void.¹ This is the usual statement of the rule of law, but it has been criticised and there are cases that have disregarded it.² Statements declaring arbitration agreements to be illegal are generally dicta where the real question is as to whether an award is a condition precedent to a right of action.

Where the award of an arbitrator is expressly made a condition precedent to the existence of any right of action, no suit will lie until the condition is fulfilled.³ There can be no possible doubt of this if the arbitration is limited to a specific issue, such as the amount of loss or damage.⁴ The same should be held even though the arbitration is general in scope.⁵

If the award of an arbitrator is not *expressly* made a condition precedent, it will not be declared to be one by construction of law. In such case it is collateral and independent, and it will not bar a suit at law.⁶ This is true even though the parties agree in express terms not to bring an action; they cannot, by such an agreement, oust the courts of jurisdiction.

Whether the award is a condition precedent or not, an action for damages will lie for breach of the agreement to submit to arbitration, where such agreement is not held to be illegal because too general in its scope.⁷ Such an action would not be

¹ *Miles v. Schmidt*, (1897) 168 Mass. 339; *Ison v. Wright*, (1900, Ky.) 55 S.W. 202; *Myers v. Jenkins*, (1900) 63 Ohio St. 101; *Meacham v. Jamestown R. Co.*, (1914) 211 N.Y. 346.

² *Fillmore v. Great Camp*, (1894) 103 Mich. 437; *Raymond v. Farmers Ins. Co.*, (1897) 114 Mich. 386; *Robinson v. Templar Lodge*, (1897) 117 Cal. 370; *President, etc., D. & H. Canal Co. v. Penna. Coal Co.*, (1872) 50 N.Y. 250. Addison C. Burnham in 11 *Harvard Law Review*, 234. See the detailed note in 15 L.R.A. (N.S.) 1055, stating the older and narrower view.

³ *Scott v. Avery*, (1856) 5 H.L.C. 811; and see *Old Colony R. Co. v. Brockton R. Co.*, (1914) 218 Mass. 84.

⁴ *Hamilton v. Liverpool Ins. Co.*, (1890) 136 U.S. 242; *Graham v. German Amer. Ins. Co.*, (1907) 75 Ohio St. 374; *National Contr. Co. v. Hudson River, etc. Co.*, (1902) 170 N.Y. 439; *Levine v. Ins. Co.*, (1896) 66 Minn. 138; *Read v. Ins. Co.*, (1897) 103 Iowa, 307.

⁵ But see *Meacham v. Jamestown R. Co.*, *supra*. A contrary rule would be not only a limitation upon our liberty of contract; it would be the creation of pretended contractual rights and duties in direct contravention of the expressed will of the parties.

⁶ *Hamilton v. Home Ins. Co.*, (1890) 137 U.S. 370; *Hill v. More*, (1855) 40 Me. 515; *Miles v. Schmidt*, (1897) 168 Mass. 339; *Haggart v. Morgan*, (1851) 5 N.Y. 422. Most cases declaring that an arbitration agreement cannot oust the courts of jurisdiction are of this sort.

⁷ *Livingston v. Ralli*, (1855) 5 E. & B. 132; *Grady v. Home Ins. Co.*,

maintainable in those cases where the court declares that the agreement is illegal because it is too general and attempts to oust the courts of jurisdiction entirely. It is to be observed, however, that these declarations are found only in cases where the agreement to arbitrate was set up by the defendant as a bar to an action and not in cases where it was alleged by the plaintiff as a cause of action.

The objection that an arbitration agreement was void cannot be raised to defeat an award after it has been made and published without objection.¹ When an award is once made, it merges the original claim in much the same way as does the judgment of a court.² Where a contract makes the finding of an architect as to the construction of a contract final, the contract will be enforced as construed by him.³ Similarly, his finding as to the character or quality of the work done is final if so provided in the contract.⁴

The power of an arbitrator to make a valid and binding award is wholly dependent on the will of the parties; either party can terminate the arbitrator's power by repudiating the agreement to submit and giving proper notice thereof.⁵ An award after such a revocation is of no force, even though the party revoking may in some cases be liable for breach of contract.

The existing law may be summarized as follows: (1) Parties to contracts have full power over the legal operation of the acts of offer and acceptance. Thus they may make the existence of any legal right that is to be derived from these voluntary acts dependent upon the award of an arbitrator. There is nothing *illegal* in this.

(1906) 27 R.L. 435; *Miller v. Canal Co.*, (1868, N.Y.) 53 Barb. 590; *Vynior's case*, (1610) 8 Co. Rep. 81b; *Warburton v. Storr*, (1825) 4 B. & C. 102. In several of these cases the agreement was to submit to arbitration all controversies whatsoever; but there was no express agreement not to bring suit, nor was the award made a condition precedent to suit. Illegality was not even suggested.

¹ *Hathaway v. Stone*, (1913) 215 Mass. 212, 218; *Norcross v. Wyman*, (1904) 187 Mass. 25, 27; *Gowen v. Pierson*, (1895) 166 Pa. 258.

² *Wiberly v. Matthews*, (1883) 91 N.Y. 648; *Hynes v. Wright*, (1892) 62 Conn. 323; *Spencer v. Dearth*, (1870) 43 Vt. 98.

³ *Merrill-Ruckgaber Co. v. U.S.*, (1916) 241 U.S. 387; *Plumley v. U.S.*, (1913) 226 U.S. 545; *Chatfield Co. v. O'Neill*, (1915) 89 Conn. 172 (*semble*).

⁴ *Norcross v. Wyman*, (1904) 187 Mass. 25.

⁵ *People ex rel. Union Ins. Co. v. Nash*, (1888) 111 N.Y. 310; *Boston & L.R. Co. v. Nashua & L.R. Co.*, (1885) 139 Mass. 463; *Marsh v. Bultel*, (1822) 5 B. & Ald. 507; *Vynior's case*, (1610) 8 Co. Rep. 81b (*semble*). Equity will not decree specific performance of an agreement to submit to arbitration. *Tobey v. County of Bristol*, (1845) 3 Story, 800, Fed. Cas. No. 14065.

(2) Where the parties have not limited in this way the legal operation of their acts, but instead have indicated an intention to create legal rights and other legal relations, a collateral agreement not to bring an action at law will not constitute a good plea in bar of such an action when brought. This is true whether the collateral agreement is declared legal or illegal.

(3) A collateral agreement to arbitrate certain specific and limited questions is not illegal, and an action for damages will lie for a refusal to perform it. Observe, however, that this valid *collateral* agreement would constitute no plea in bar of an action.

(4) A collateral agreement to arbitrate *all* disputes that may arise, and not to bring suit at law, is still generally declared to be illegal. It is neither a bar nor in itself a cause of action. This denial of an action for breach is the only real application of the supposed rule that arbitration agreements are illegal.

(5) It is not forbidden to carry out any arbitration agreement, whether limited or general. The *performance* of the agreement is not illegal. Instead,

(6) The award of an arbitrator on any matter actually submitted to him and honestly determined by him after a proper hearing is valid and enforceable. Not only so, it is also *conclusive* on the parties thereto, being in this respect similar to the judgment of a court.¹

252. Agreements which tend to abuse of legal process. Under the old names of maintenance and champerty two objects of agreement are described which the law regards as unlawful. They tend to encourage litigation which is not *bona fide* but speculative. It is not thought well that one should buy an interest in another's quarrel, or should incite to litigation by offers of assistance for which he expects to be paid.

Maintenance has been defined to be "when a man maintains a suit or quarrel to the disturbance or hindrance of right."

Champerty is where "he who maintains another is to have by agreement part of the land, or debt, in suit."^a

Maintenance is a civil wrong which does not often figure in the law of contract. It is thus defined by Lord Abinger:

"The law of maintenance, as I understand it upon modern constructions, is confined to cases where a man improperly and for the purpose

^a Com. Dig. vol. v. p. 22. *Re a Solicitor*, [1912] 1 K.B. 302.

¹ See in general on the whole subject of arbitration, *Smith v. Boston*, etc. R.R., (1858) 36 N.H. 458.

of stirring up litigation and strife encourages others to bring^a actions or to make defenses which they have no right to make."^b

Lord Coleridge, C.J., held that this definition was applicable to the giving of an indemnity to an informer against costs incurred in endeavoring to enforce a statutory penalty.^c

But it is not wrongful to provide the means by which a poor man may maintain a suit, even though the charity may be misguided and the action groundless, provided it be disinterested, and the same principle applies with greater force to the case of a kinsman or servant.^{d 1}

Champerty, or the maintenance of a quarrel for a share of the proceeds, has been repeatedly declared to avoid an agreement made in contemplation of it.² It would seem that there is no unlawfulness in the supply of information which would enable property to be recovered, in consideration of receiving a part of the property when recovered, but any further aid in the promo-

^a The old books suggest that it is not maintenance to start an action. "A maintenance cannot be, unless he has some plea pending at the time." (Viner, Abridg., Tit. maintenance.) So unreasonable a distinction appears to have been dropped in modern decision.

^b Findon v. Parker, (1843) 11 M. & W. 682.

^c Bradlaugh v. Newdegate, (1883) 11 Q.B.D. 5.

^d Harris v. Brisco, (1886) 17 Q.B.D. 504.

¹ *Thalhimer v. Brinckerhoff*, (1825, N.Y.) 3 Cow. 623; *Proctor v. Cole*, (1885) 104 Ind. 373; *Re Evans*, (1900) 22 Utah, 366.

² There is disagreement in the American courts as to what constitutes champerty. (1) Some courts hold that an agreement to look to the proceeds of the suit for compensation is champerty. *Ackert v. Barker*, (1881) 131 Mass. 436; *Hadlock v. Brooks*, (1901) 178 Mass. 425; *Butler v. Legro*, (1882) 62 N.H. 350. (2) Some courts hold that in addition the attorney must prosecute the suit at his own cost and expense to constitute champerty. *Phillips v. South Park Com'rs*, (1887) 119 Ill. 626; *Peck v. Heurich*, (1897) 167 U.S. 624; *Hart v. State*, (1889) 120 Ind. 83; *Jewel v. Neidy*, (1883) 61 Iowa, 299; *Northwestern S.S. Co. v. Cochran*, (1911, C.C.A.) 191 Fed. 146; *Brown v. Ginn*, (1902) 66 Ohio St. 316; *Perry v. Dicken*, (1884) 105 Pa. 83; *Dockery v. McLellan*, (1896) 93 Wis. 381. (3) Some courts hold even in a case like (2) that there is no champerty. *Taylor v. Bemiss*, (1884) 110 U.S. 42; *Fowler v. Callan*, (1886) 102 N.Y. 395 (statutory); *Brown v. Bigné*, (1891) 21 Ore. 280; *Hoffman v. Vallejo*, (1873) 45 Cal. 564. (4) All authorities agree that a contract for a contingent fee is not champerty if it is not to be paid out of the proceeds of the suit. *Blaisdell v. Abern*, (1887) 144 Mass. 393; *Bennett v. Tighe*, (1916) 224 Mass. 159; *Hadlock v. Brooks*, *supra*. (5) In some states it is declared that the common law doctrines of maintenance and champerty are unknown; *Mathewson v. Fitch*, (1863) 22 Cal. 86; *Smits v. Hogan*, (1904) 35 Wash. 290; in some the matter is regulated wholly by statute. *Irwin v. Curie*, (1902) 171 N.Y. 409; *Lehman v. Detroit R. Co.*, (1914) 180 Mich. 362; and in most there is a marked tendency to narrow the doctrines of champerty or to evade them. *Reece v. Kyle*, (1892) 49 Ohio St. 475; *Dunne v. Herrick*, (1890) 37 Ill. App. 180; *Manning v. Sprague*, (1888) 148 Mass. 18; *Richardson v. Rowland*, (1873) 40 Conn. 565; cases *supra*. See 12 L.R.A. (N.S.) 606.

tion of a suit by money or influence is champerty.^{a 1} Its less obvious form, a purchase, out and out, of a right to sue has been regarded as an assignment of a *chose in action*, a matter with which we shall presently come to deal.² Such an agreement is binding if the purchase includes any substantial interest beyond a mere right to litigate. If property is bought to which a right to sue attaches, that fact will not avoid the contract,³ but an agreement to purchase a bare right of action would not be sustained.^{b 4}

253. Agreements which are contrary to good morals. The only aspect of immorality with which the courts of law have dealt is sexual immorality; and the law upon this point may be shortly stated.

A promise made in consideration of future illicit cohabitation is given upon an immoral consideration, and is unlawful whether made by parol or under seal.^{c 5}

A promise made in consideration of past illicit cohabitation is not taken to be made on an illegal consideration, but is a mere gratuitous promise, binding if made under seal, void if made by parol.^{d 6}

And an agreement innocent in itself will be vitiated if intended to further an immoral purpose and known by both parties to be so intended.^{e 7}

254. Agreements which affect the freedom or security of marriage or the due discharge of parental duty. Such agreements, in so far as they restrain the freedom of marriage, are

^a *Stanley v. Jones*, (1831) 7 Bing. 369; *Rees v. de Bernardy*, [1896] 2 Ch. 447.

^b *Prosser v. Edmonds*, (1835) 1 Y. & C. 499. ^c *Ayerst v. Jenkins*, (1872) 16 Eq. 275.

^d *Gray v. Mathias*, (1800) 5 Ves. 285a; *Beaumont v. Reeve*, (1846) 8 Q.B. 483.

^e *Pearce v. Brooks*, (1866) L.R. 1 Ex. 213.

¹ See *Wellington v. Kelly*, (1881) 84 N.Y. 543.

² See *post*, § 302 *et seq.* ³ *Traer v. Clews*, (1885) 115 U.S. 528.

⁴ *Zabriskie v. Smith*, (1855) 13 N.Y. 322 [but see *Haight v. Hayt*, (1859) 19 N.Y. 464; *Brackett v. Griswold*, (1886) 103 N.Y. 425]; *John V. Farwell Co. v. Wolf*, (1897) 96 Wis. 10; *Storrs v. Hospital*, (1899) 180 Ill. 368. Assignability depends largely upon statutory provisions. *Farwell v. Wolf*, *supra*.

⁵ *Boigneres v. Boulon*, (1880) 54 Cal. 146; *Brown v. Tuttle*, (1888) 80 Me. 162. Cf. *Kurts v. Frank*, (1881) 76 Ind. 594.

⁶ *Brown v. Kinsey*, (1879) 81 N.C. 245; *Wallace v. Rappleye*, (1882) 103 Ill. 229.

⁷ *Ernst v. Crosby*, (1893) 140 N.Y. 364; *Reed v. Brewer*, (1896) 90 Tex. 144; *Graves v. Johnson*, (1892) 156 Mass. 211. In a later appeal of this case, (1901) 179 Mass. 53, it was held that a contract for the sale of liquor was not invalidated by the mere fact that the seller *knew* that the buyer intended to resell the liquor in violation of law. The distinction was drawn between mere *knowledge* of the illegal purpose and *participation* therein. A further distinction should no doubt be drawn on the basis of the degree of wickedness involved in the purpose of the one that is known to the other.

discouraged on public grounds as injurious to the moral welfare of the citizen. Thus a promise under seal to marry no one but the promisee on penalty of paying her £1000 was held void, as there was no promise of marriage on either side and the agreement was purely restrictive.^a So too a wager in which one man bet another that he would not marry within a certain time was held to be void, as giving to one of the parties a pecuniary interest in his celibacy.^{b 1}

What are called marriage brokerage contracts, or promises made upon consideration of the procuring or bringing about a marriage, are held illegal "not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation."^c And so an agreement to introduce a person to others of the opposite sex with a view to marriage is unlawful, although there is a choice given of a number of persons, and not an effort to bring about marriage with a particular person.^{d 2}

Agreements providing for separation of husband and wife are valid if made in prospect of an immediate separation.³ But it is

^a *Lowe v. Peers*, (1768) 4 Burr. 2225.

^b *Hartley v. Rice*, (1808) 10 East, 22.

^c *Cole v. Gibson*, (1750) 1 Ves. Sen. 503.

^d *Hermann v. Charlesworth*, [1905] 2 K.B. (C.A.) 131.

¹ Promises and conditions directly in restraint of marriage are held to be void. *Sterling v. Sinnickson*, (1820) 5 N.J. L. 756; *Chalfant v. Payton*, (1883) 91 Ind. 202. But where the defendant has promised to pay for lawful services on condition that the servant do not marry for a certain period, the fulfillment of the condition is not illegal although not in itself a valid consideration, and it will not prevent the plaintiff from recovering the agreed price of the service. *King v. King*, (1900) 63 Ohio St. 363; *Fletcher v. Osborn*, (1917, Ill.) 118 N.E. 446. *Contra*: *Lowe v. Doremus*, (1913) 84 N.J. L. 658.

² *Duval v. Wellman*, (1891) 124 N.Y. 156; *Morrison v. Rogers*, (1896) 115 Cal. 252. See 104 Am. St. Rep. 919, note.

³ *Randall v. Randall*, (1877) 37 Mich. 563; *Clark v. Fosdick*, (1889) 118 N.Y. 7 [see *Hungerford v. Hungerford*, (1900) 161 N.Y. 550]; *Bailey v. Dillon*, (1904) 186 Mass. 244. But agreements for collusive divorce are illegal. *Cross v. Cross*, (1878) 58 N.H. 373; *Adams v. Adams*, (1878) 25 Minn. 72; *Irvin v. Irvin*, (1895) 169 Pa. 529; *Baum v. Baum*, (1901) 109 Wis. 47. An agreement between the parties to a pending divorce action, fixing the alimony to be paid has often been held illegal; *Seeley's Appeal*, (1888) 56 Conn. 202; *Muckenburgh v. Haller*, (1867) 29 Ind. 139; but the contrary has been held where it is clear that the agreement is not for the purpose of suppressing testimony or facilitating the divorce; *Palmer v. Fagerlin*, (1910) 163 Mich. 345; *Maisch v. Maisch*, (1913) 87 Conn. 377. A promise to forbear to press a suit for a divorce is not an illegal consideration. *Polson v. Stewart*, (1897) 167 Mass. 211; *Adams v. Adams*, (1883) 91 N.Y. 381; *Phillips v. Meyers*, (1876) 82 Ill. 67. But an agreement to resume interrupted marital relations has been held to be an illegal consideration. *Merrill v. Peaselee*, (1888) 146 Mass. 460. This case is greatly limited in *Terkelsen v. Petersen*, (1914) 216 Mass. 531. See note in 31 L.R.A. (N.S.) 441. See also *Oppenheimer v. Collins*, (1902) 115 Wis. 283.

otherwise if they contemplate a possible separation in the future, whether made before or after marriage, because then they give inducements to the parties not to perform "duties in the fulfillment of which society has an interest."^{a 1}

And for the same reason an agreement by a mother to transfer to another her rights and duties in respect of an illegitimate child has been held illegal, because the law imposed a duty on the mother "in respect of the infant and for its benefit."^{b 2}

255. Agreements in restraint of trade. The law concerning restraint of trade has changed from time to time with the changing conditions of trade, but with trifling exceptions these changes have been a continuous development of a general rule.

The early cases show a disposition to avoid all contracts "to prohibit or restrain any, to use a lawful trade at any time or at any place," as being "against the benefit of the commonwealth."^c But soon it became clear that the commonwealth would not suffer if a man who sold the good-will of a business might bind himself not to enter into immediate competition with the buyer; thus it was laid down in *Rogers v. Parry*^d that "a man cannot bind one that he shall not use his trade generally," "but for a time certain, and in a place certain, a man may be well bound and restrained from using of his trade."

256. The older rule. A rule thus became established that contracts in general restraint of trade were invalid, but that contracts in partial restraint would be upheld.

But as trade expanded and the dealings of an individual ceased to be confined to the locality in which he lived, the distinction between general and partial restraints passed into a distinction between restraints unlimited as to place and restraints unlimited as to time, and it was laid down that a man might not by contract assume the duty not to carry on a certain trade *anywhere* for ten years, though he might by contract assume a duty *never* to carry on a trade within ten miles of London.³

^a *Cartwright v. Cartwright*, (1853) 3 D. M. & G. 989.

^b *Humphrys v. Polak*, [1901] 2 K.B. (C.A.) 385.

^c *Colegate v. Bachele*, (1596) Cro. Elis. 872.

^d (1613) *Bulstrode*, 136.

¹ *People v. Mercein*, (1839, N.Y.) 8 Paige, 47.

² See *Brooke v. Logan*, (1887) 112 Ind. 183; *Johnson v. Terry*, (1867) 34 Conn. 259.

³ The growth of the doctrine in an American state is well illustrated by the Massachusetts cases. See *Anchor Electric Co. v. Hawkes*, (1898) 171 Mass. 101, cases there cited, and the earlier cases of *Alger v. Thacher*, (1837, Mass.) 19 Pick. 51 (giving the history and reasons of the common-law rule)

The rule as thus expressed was inapplicable to the modern conditions of trade. In the sale of a good-will or a trade secret the buyer might in old times have been sufficiently protected by limited restrictions as to the place or persons with whom the seller should henceforth deal. This is not so where an individual or a company supplies some article of commerce to the civilized world; and the modern view of the distinction between general and partial restraints is more flexible, and its application is well illustrated by *The Maxim-Nordenfelt Gun Co. v. Nordenfelt*.^a

257. The modern rule as to restraint of trade. — *Maxim-Nordenfelt Gun Co. v. Nordenfelt*. Nordenfelt was a maker and inventor of guns and ammunition: he sold his business to the company for £287,500, and agreed that for twenty-five years he would cease to carry on the manufacture of guns, gun-carriages, gunpowder, or ammunition, or any business liable to compete with such business as the company was carrying on for the time being. He kept the privilege of dealing in explosives other than gunpowder, in torpedoes or submarine boats, and in metal castings or forgings.

After some years Nordenfelt entered into business with another company dealing with guns and ammunition; the plaintiffs sought an injunction to restrain him from so doing.

The House of Lords, affirming the judgment of the Court of Appeal, were of opinion —

(1) that the covenant not to compete with the company in any business which it might carry on was a general restraint of trade, that it was unreasonably wide and therefore void, but that it was distinct and severable from the rest of the contract;

(2) that the sale of a business accompanied by an agreement by the seller to retire from the business, is not void, provided it is reasonable between the parties, and not injurious to the public.

This restraint was reasonable between the parties, because Nordenfelt not only received a very large sum of money, but retained considerable scope for the exercise of his inventive and manufacturing skill, while the wider area over which the business extended necessitated a restraint coextensive with that area

^a [1894] A.C. 535.

and *Taylor v. Blanchard*, (1866, Mass.) 13 Allen, 370 (holding restraint as to whole state invalid in the case of the sale of a manufactory). And see *Bishop v. Palmer*, (1888) 146 Mass. 469. See, for a quite modern application of the old rule, *Lufkin Rule Co. v. Fringeli*, (1898) 57 Ohio St. 596, where the modern rule is criticised as ignoring the interests of the public and tending to encourage monopolies.

for the protection of the plaintiffs. Nor could the agreement be said to be injurious to the public interest, since it transferred to an English company the making of guns and ammunition for foreign lands.

The House of Lords, after considering all the authorities, made it clear that the division of agreements in restraint of trade into two classes — general and partial (the former being necessarily void in all cases, the latter only if unreasonable or injurious to the public interest) could no longer be sustained, even if it had ever existed as a rule of the common law.

"The only true test," said Lord Macnaghten, "in all cases, whether of partial or general restraint, is the test proposed by Tindal, C.J., in *Horner v. Graves* (7 Bing. 735), What is a reasonable restraint with reference to this particular case?"^a

258. Same. Tests of reasonableness. We may now, therefore, regard the law as settled that the duration of the contract, and the area over which it is meant to extend, are not determining factors as regards its validity, but are elements in the general consideration by the court of the reasonableness of the transaction, and the question of reasonableness is for the court and not for the jury to decide.^b

But the reasonableness of the transaction is not the only matter into which the courts will inquire. A covenant might be fair as between the parties and yet injurious to the public interest. It would then be held void.^c

259. Same. Consideration. It remains to note that at one time it was thought that the courts would inquire into the *adequacy* of the consideration given for the promise not to trade. But this was disavowed by the Exchequer Chamber in *Hitchcock v. Coker*,^d and seems to resolve itself into the rule which requires the promisee to satisfy the court that the transaction is reasonable.¹

259a. Same. American note.² Contracts in restraint of trade fall within two general classes:

1. Contracts involving the creation or the transfer of a business or profession, with attendant good-will.

^a [1894] A.C. 574.

^b *Underwood v. Barker*, [1899] 1 Ch. (C.A.) 300; *Mason v. Provident Clothing Co.*, [1913] A.C. 724.

^c *Nordenfelt v. Maxim-Nordenfelt Gun Co.*, [1894] A.C. 549. ^d (1837) 6 A. & E. 438.

¹ Actual consideration is necessary. See § 88, *ante*. But adequacy of consideration is treated as in other cases of contract. *Ryan v. Hamilton*, (1903) 205 Ill. 191; *Up River Ice Co. v. Denler*, (1897) 114 Mich. 296; *McCurry v. Gibson*, (1895) 108 Ala. 451.

² By the American editor.

2. Contracts solely for the purpose of preventing competition.

Contracts of the first class are generally held to be valid, if the restraint is no greater than is reasonably necessary for carrying out the other legitimate purposes of the contract. The incidental restraint of trade competition is injurious to the public, and will invalidate the contract except where this injury is outweighed by counterbalancing advantages. It is of advantage to the community that business good-will should be developed and should be convertible into other forms of property. To secure this advantage it is necessary to enforce certain restraining agreements. It is for the same reason that certain "unfair" forms of competition are forbidden by law, even in the absence of any agreement.

In the United States there has been the same development in legal opinion as in England. Some of the older decisions applied the rule that general restraint throughout an entire state was illegal, and this may still be the law in some states.¹ The rule as laid down in *Nordenfelt v. Maxim-Nordenfelt Co.* is much to be preferred, however, and is now very generally followed.²

Contracts falling within the second class are nearly always held to be illegal and void. These are contracts the sole object of which is the suppression of competition between the sellers of goods, there being no transfer of a business with its good-will.³

¹ See *Henschke v. Moore*, (1917, Pa.) 101 Atl. 308; *Strawboard Co. v. Bonfield*, (1901) 193 Ill. 425; *Oil Co. v. Nunnemaker*, (1895) 142 Ind. 560.

² *Diamond Match Co. v. Roeber*, (1887) 106 N.Y. 473; *Hall Mfg. Co. v. Western Steel Works*, (1915) 227 Fed. 588, L.R.A. 1916 C, 620, note; *Wood v. Whitehead Bros.*, (1901) 165 N.Y. 545; *Herreshoff v. Boutineau*, (1890) 17 R.I. 3; *National Benefit Co. v. Union Hospital Co.*, (1891) 45 Minn. 272; *Swigert v. Tilden*, (1903) 121 Iowa, 650; *Trenton Potteries Co. v. Oliphant*, (1899) 58 N.J. Eq. 507; *Knapp v. S. Jarvis Adams Co.*, (1905) 135 Fed. 1008; *Roberts v. Lemont*, (1905, Neb.) 102 N.W. 770.

³ *Oliver v. Gilmore*, (1892) 52 Fed. 562; *Santa Clara &c. Co. v. Hayes*, (1888) 76 Cal. 387; *Richardson v. Buhl*, (1889) 77 Mich. 632; *Cummings v. Union Blue Stone Co.*, (1900) 164 N.Y. 401; *Nester v. Continental Brewing Co.*, (1894) 161 Pa. 473; *Emery v. Ohio Candle Co.*, (1890) 47 Ohio St. 320. Cf. *Central Shade Roller Co. v. Cushman*, (1887) 143 Mass. 353; *Star Pub. Co. v. Associated Press*, (1900) 159 Mo. 410. See also 74 Am. St. Rep. 235, note.

In *McCarter v. Firemen's Ins. Co.*, (1909, N.J.) 73 Atl. 80, the court granted an injunction to prevent the carrying out of the illegal contract; but the prevailing rule is merely to declare the contract illegal and void in any suit brought for its enforcement, except where some other remedy is provided by statute. Such statutes are numerous. The Federal Anti-Trust Act, 26 U.S. St. at L. 209 (the Sherman Act of 1890), is of this character, applying, however, only to contracts in restraint of interstate trade. Many of the states have similar acts. See 64 L.R.A. 689, note; L.R.A. 1917 A, 376, 379.

In this class of cases the contract is illegal and void because of the tendency toward monopoly and the suppression of competition, and it makes no difference whether the restraint is total or partial. There is here no counterbalancing benefit to the public, as there is where there is a sale of good-will, to be found in the added value given to such a business interest by making it saleable; it is not yet believed that there is a sufficient public benefit to be gained from the increased stability of prices.¹

This principle has been held to apply to agreements among skilled laborers restricting competition by fixing a standard price for their labor.² It may be doubted whether the same would be held in case of a labor union organized for the purpose of securing higher wages and other benefits as well. It is generally believed that such unions are for the benefit of society at large, in spite of the fact that they raise the price of labor. It is everywhere now conceded that the formation and operation of a union is not a tort, even though other persons are thereby forced to pay higher prices for labor. It does not necessarily follow from this, however, that an action at law will lie for a refusal to perform the union agreement. A contract to maintain a "closed shop" (to employ union labor exclusively) has been held void where it closes nearly all of the shops in the community.³

Where the commodity involved is not one of prime necessity (e.g., beer), a contract of this kind has been sustained.⁴

If the contract limits a public service corporation in the fulfillment of its public duties, the performance of the contract may be prevented by injunction; but this hardly rests upon the principles governing contracts in restraint of trade.⁵

II. EFFECT OF ILLEGALITY UPON CONTRACTS IN WHICH IT EXISTS

260. What is the effect of illegality? The effect of illegality upon the validity of contracts in which it exists, must needs

¹ *More v. Bennett*, (1892) 140 Ill. 69; *Nester v. Brewing Co.*, (1894) 161 Pa. 473.

² *More v. Bennett*, *supra*. See also *Collins v. Locke*, (1879) 4 App. Cas. 674.

³ *Connors v. Connolly*, (1913) 86 Conn. 641.

⁴ *Cade v. Daly*, (1910) 1 I.R. 306. *Contra*, *Nester v. Brewing Co.*, (1894) 161 Pa. 473. See also *Anheuser-Busch B. Ass'n v. Houck*, (1894, Tex.) 27 S.W. 692.

⁵ *McCarter v. Firemen's Ins. Co.*, (1909, N.J.) 73 Atl. 80; *Att'y Gen. v. Great Northern R. Co.*, (1880) 1 Dr. & Sm. 154; *Gibbs v. Consol. Gas. Co.*, (1888) 130 U.S. 396.

vary according to circumstances. It may affect the whole or only a part of the contract, and the legal part may or may not be severable from the illegal. One of the parties may be ignorant of the illegal object which the contract is intended to serve, or both may be ignorant of any illegal intention.

The contract may be discouraged in the sense that the law will not enforce it, or prohibited in such a way as to taint collateral contracts and securities given for money advanced to promote an illegal transaction or paid to satisfy a claim arising out of such a transaction.

I will endeavor to state some rules which may enable the reader to work his way through a complex branch of the law.

1. *When the contract is divisible*

261. **Severance of legal from illegal parts.** A contract may consist of several parts; it may be divisible into several promises based on several considerations, and then the illegality of one or more of these considerations will not avoid all the promises if those which were made upon legal considerations are severable from the others. This is an old rule, and is set forth in Coke's Reports, "That if some of the covenants of an indenture or of the conditions indorsed upon a bond are against law, and some good and lawful; that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good."^a

The rule holds whether the illegality exist by statute or at common law, though at one time the judges thought differently, and fearing lest statutes might be eluded, laid it down that "the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes only void that part where the fault is and preserves the rest."^b

The rule in its modern form may be thus stated:

"Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad part and retain the good."^c

Illustrations of the rule are to be found in cases where a corporation has entered into a contract some parts of which are *ultra vires*, and so, in a sense, unlawful;^d or where it is possible to

^a Pigot's Case, (1613) Co. Rep. 11. 27. b. ^b Maleverer v. Redshaw, (1668) 1 Mod. 35.

^c Per Willes, J., in Pickering v. Iffracombe Railway, (1868) L.R. 3 C.P. 250.

^d These cases may serve as an illustration of the proposition before us; but it must be borne in mind that Lord Cairns, in The Ashbury Carriage Co. v. Riche, (1875) L.R. 7 H.L. 653, has pointed out that contracts of this nature are invalidated not so much by the *illegality* of their object as by the *incapacity* of the corporation to bind itself by agreement for purposes beyond its statutory powers. See ante, § 164.

sever covenants in restraint of trade either as regards the distances within which the restraint applies, or the persons with whom the trade is to be carried on. Recent decisions furnish instances of covenants of this nature which are, and of covenants which are not severable.^{a 1}

2. *When the contract is indivisible*

262. Impossibility of severance. Where there is one promise made upon several considerations, some of which are bad and some good, the promise would seem to be void, for you cannot say whether the legal or illegal portion of the consideration most affected the mind of the promisor and induced his promise.² An old case which may be quoted in its entirety will illustrate this proposition:

"Whereas the plaintiff had taken the body of one H. in execution at the suit of J. S. by virtue of a warrant directed to him as special bailiff; the defendant in *consideration he would permit him to go at large*, and of two shillings to the defendant paid, promised to pay the plaintiff all the money in which H. was condemned. Upon *non assumpsit* it was found for the plaintiff. It was moved in arrest of judgment, that the consideration is not good, being contrary to the statute of 23 Hen. VI, and that a promise and obligation was all one. And though it be joined with another consideration of two shillings, yet being void and against the statute in part it is void in all."^b

^a *Baines v. Geary*, (1887) 35 Ch. D. 154; *Baker v. Hedgecock*, (1888) 39 Ch. D. 520; *Bromley v. Smith*, [1909] 2 K.B. 235.

^b *Fetherston v. Hutchinson*, (1592) Cro. Elis. 199.

¹ If there are two promises, one legal and one illegal, resting upon one legal consideration, the promisee may waive the illegal promise and enforce the legal one. *Erie Railway Co. v. Union Loc. and Exp. Co.*, (1871) 35 N.J. L. 240; *Fishell v. Gray*, (1897) 60 N.J. L. 5; *United States v. Bradley*, (1836, U.S.) 10 Pet. 343, 360-64; *Gelpcke v. Dubuque*, (1863, U.S.) 1 Wall. 221; *McCullough v. Virginia*, (1898) 172 U.S. 102; *Osgood v. Bauder*, (1888) 75 Iowa, 550; *Dean v. Emerson*, (1869) 102 Mass. 480; *Peltz v. Eichele*, (1876), 62 Mo. 171; *Smith's Appeal*, (1886) 113 Pa. 579; *Osgood v. Cent. Vt. R.*, (1905) 77 Vt. 334. But not, it would seem, if the illegal act is highly immoral or highly detrimental to the public good. *Lindsay v. Smith*, (1878) 78 N.C. 328; *Santa Clara &c. Co. v. Hayes*, (1888) 76 Cal. 387.

² If there is one legal promise resting upon two considerations, one of which is legal and the other illegal, the promisee cannot enforce the promise, for he cannot (legally) perform the consideration. *Bixby v. Moor*, (1871) 51 N.H. 402; *Bishop v. Palmer*, (1888) 146 Mass. 469; *Handy v. St. Paul Globe Co.*, (1889) 41 Minn. 188; *Ramsey v. Whitbeck*, (1900) 183 Ill. 550; *Bank v. King*, (1870) 44 N.Y. 87; *Foley v. Speir*, (1885) 100 N.Y. 552; *Owens v. Wilkinson*, (1902) 20 App. D.C. 51; *Sedgwick Co. v. State*, (1903) 66 Kans. 634. It will be observed that an illegal contract might be enforced, so far as legal, by one party, but not by the other. *Bishop v. Palmer*, *supra*; *Fishell v. Gray*, *supra*; *Lindsay v. Smith*, *supra*.

3. *Comparative effects of avoidance and illegality*

263. Construction of statutes. When there is no divisibility of promises or consideration, we have to consider first what was the attitude of the law towards the transaction contemplated, and next what was the mind of the parties towards the law.

The law may deal with a contract which it would discourage in one of three ways.

It may impose a penalty without avoiding the contract.

It may avoid the contract.

It may avoid, and penalize or prohibit.

In this last case we must take the word "penalize" to mean not merely the imposition of a penalty, but the liability to damage for a wrong, or to punishment for a crime. A statutory penalty is merely a suggestion of prohibition. Whether it is prohibitory or not is, in every case, a question of construction.

Thus we may suppose the state to say to the parties as regards these three kinds of transactions:

(a) You may make the contract if you please, but you will have to pay for it.

(b) You may make the agreement if you please, but the courts will not enforce it.

(c) You shall not make the agreement if the law can prevent you.

With the first case we are not concerned. There is a valid contract, though it may be expensive to the parties.

As to the second and third, difficulties can only arise as regards collateral transactions, for in neither case can the contract be enforced. The intentions of the parties we will postpone for the present. They must be assumed to know the law.

It may be stated at once that there is a clear distinction between agreements which are merely *void* and agreements which are *illegal*: between agreements which the law will not aid, and agreements which the law desires to prohibit: and that this distinction comes out, not in the comparative validity of the two, for both are void, but in the effect which their peculiar character imparts to collateral transactions.

264. Contracts in aid of illegal transactions. No contract, however innocent in itself, is good, if designed to promote an illegal transaction, whether the illegality arises at common law, or by statute.

In *Pearce v. Brooks*^a a coach-builder sued a prostitute for

^a (1886) L.R. 1 Ex. 213.

money due for the hire of a brougham, let out to her with a knowledge that it was to be used by her in the furtherance of her immoral trade. It was held that the coach-builder could not recover.¹ And a landlord who had let premises to a woman who was, to the knowledge of the landlord's agent, the kept mistress of a man who was in the habit of visiting her there, was not permitted to recover his rent.^a

McKinnell lent Robinson money to play at hazard, knowing that the money was to be so used. Hazard (together with certain other games, Ace of Hearts, Pharaoh and Basset) is forbidden,^b and the players rendered subject to a penalty by 12 Geo. II, c. 28, a prohibitory and penal statute. It was held that the lender could not recover.^{c 2}

Nor is a contract valid which is intended to carry into effect a prohibited transaction. Cannan was the assignee of a bankrupt, and sued Bryce to recover the value of goods given to Bryce by the bankrupt in part satisfaction of a bond, which in its turn had been given to Bryce by the bankrupt to secure the payment of money lent by Bryce to meet losses which had been incurred by the stock-jobbing transactions of the bankrupt. Now Sir John Barnard's Act (7 Geo. II, c. 8, § 5) forbade not only wagers on the price of stock, but advances of money to meet losses on such transactions, and Bryce had lent money knowing that it was to meet such losses. Therefore his bond was void, and no property passed to him in the goods given in satisfaction of it, and Cannan was able to recover their value.^d

265. Void agreements distinguished. The difference between the effect of illegality and of avoidance is clear when we look at transactions arising out of wagers:

^a *Upfill v. Wright*, [1911] 1 K.B. 506.

^b Roulette or rolypoly is similarly prohibited and penalised by 18 Geo. II, c. 34.

^c *McKinnell v. Robinson*, (1838) 3 M. & W. 434.

^d *Cannan v. Bryce*, (1819) 3 B. & Ald. 179.

¹ *Ernst v. Crosby*, (1893) 140 N.Y. 364 (house rented for immoral purpose). But mere knowledge is in the United States generally held insufficient; there must be an intent to aid in the accomplishment of the illegal purpose. *Anheuser-Busch Brewing Ass'n v. Mason*, (1890) 44 Minn. 318; *Bryson v. Haley*, (1895) 68 N.H. 337; *Tyler v. Carlisle*, (1887) 79 Me. 210; *Graves v. Johnson*, (1892) 156 Mass. 211; s.c., (1901) 179 Mass. 53; *Tracy v. Talmage*, (1856) 14 N.Y. 162; *Hill v. Spear*, (1870) 50 N.H. 253. Unless the known object is of a heinous nature. *Hanauer v. Doane*, (1870, U.S.) 12 Wall. 342. Aiding the illegal purpose renders the contract illegal. *Marterne v. Horwitz*, (1886) 101 N.Y. 469.

² The same distinction between knowledge and intent is made in these cases in the United States. *Tyler v. Carlisle*, (1887) 79 Me. 210; *Jackson v. Bank*, (1890) 125 Ind. 347. See 14 Am. & Eng. Encyc. of Law (2d ed.), p. 641.

"There is certainly nothing illegal," said Farwell, L.J., in *Hyams v. Stuart King*, "in paying or receiving payment of a lost bet: it is one thing for the law to refuse to assist either party in their folly, if they will bet; it is quite another to forbid the loser to keep his word."^a

In that case the defendant was indebted to the plaintiff as a result of certain betting transactions and desired time in which to pay. The Gaming Act of 1845 would have been a defense to legal proceedings for the debt, but on the plaintiff threatening to declare the defendant a defaulter, the defendant promised to pay in a few days, if the threat were not carried out. On this new promise and consideration he was held liable.

It was argued on his behalf that the original transactions between himself and the plaintiff were illegal, and that the promise to pay even if based on a new consideration was tainted with the illegality of the wager out of which it arose; but the Court of Appeal held that the wager was void only and that therefore no taint of illegality affected the subsequent promise of the defendant.

So, too, before the Gaming Act of 1892 altered the law in this particular respect, as between employer and betting commissioner, the ordinary relations of employer and employed held good in all respects, including the ordinary liability of an employer to indemnify the person whom he employed against loss or risk, which might accrue to him in the ordinary course of the employment, though the employment was to make void contracts.

In *Read v. Anderson*,^b therefore, the employer was compelled to repay the commissioner money expended by him in discharging bets owing by his employer, even though the latter had revoked his authority to do so; for had the commissioner not discharged them, he would have been posted as a defaulter and would have lost his business; and against this risk his employer was bound to indemnify him.^c

On the same principle *Seymour v. Bridge*^d was decided. An

^a [1908] 2 K.B. at p. 725.

^b (1884) 13 Q.B.D. 779.

^c The Gaming Act of 1892, however, does not touch the principle laid down in *Bridger v. Savage*, (1885) 15 Q.B.D. 363, that a betting commissioner is bound to pay over money received on account of bets won by him on behalf of his principal.

^d (1885) 14 Q.B.D. 460.

¹ In the United States, wagers are both illegal and void, and an agent who is privy to the illegal design cannot recover advances or commissions. *Harvey v. Merrill*, (1889) 150 Mass. 1; *Mohr v. Miesen*, (1891) 47 Minn. 228; *Irwin v. Williar*, (1884) 110 U.S. 499; *Embrey v. Jemison*, (1888) 131 U.S. 336. See *Markham v. Jaudon*, (1869) 41 N.Y. 235.

investor employed a broker to buy shares for him according to the rules of the Stock Exchange. The Stock Exchange enforces among its members, under pain of expulsion, agreements made in breach of Leeman's Act,^a under which a contract for the sale of bank shares is avoided where the contract does not specify their numbers, or the name of the registered proprietor. Bridge knew of the custom, but endeavored to repudiate the purchase on the ground that it was not made in accordance with the terms of the statute. The case was held to be governed by *Read v. Anderson*. The employer is bound to indemnify the employed against known risks of the employment. If the risks are not known to both parties, and might reasonably be unknown to the employer, he is not so bound. Thus where an investor did not know of the custom, he was held, under circumstances in other respects precisely similar to those of *Seymour v. Bridge*, not to be bound to pay for the shares.^b

4. *The intention of the parties*

266. Intention as a rule immaterial: exceptions. Where the object of the contract is an unlawful act the contract is void, though the parties may not have known that their act was illegal or intended to break the law.¹

Exception (1). But if the contract admits of being performed, and is performed in a legal way, the intention of the parties may become important; for if they did not intend to break the law, and the law has not in fact been broken, money due under the contract will be recoverable even though the performance as originally contemplated would have involved a breach of the law.

Morris chartered a ship belonging to Waugh to take a cargo of hay from Trouville to London. It was agreed that the hay should be unloaded alongside ship in the river, and landed at a wharf in Deptford Creek. Unknown to the parties an Order in Council^c had forbidden the landing of French hay. Morris, on hearing this, took the cargo from alongside the ship without landing it, and exported it. The vessel was delayed beyond the lay-days, and Waugh sued for damages arising from the delay. Morris set up as a defense that the contract (*viz.* the charter-party) contemplated an illegal act, the landing of French hay

^a 30 & 31 Vict. c. 29.

^b *Perry v. Barnett*, (1885) 15 Q.B.D. 388.

^c Under 32 & 33 Vict. c. 70, § 78.

¹ *Harriman v. Northern Securities Co.*, (1904) 197 U.S. 244.

contrary to the Order in Council. But the defense did not prevail:

"Where a contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so the knowledge of what the law is becomes of great importance."¹

Exception (2). Again, the general rule needs modification where only one of the parties had the intention to break the law.² Such a case could only arise where the contract was to do a thing innocent in itself, but designed to promote an illegal purpose. We may perhaps lay down with safety the following rules.

Where the innocent party knows nothing of the illegal object throughout the transaction, he is entitled to recover what may be due to him. If the plaintiff in *Pearce v. Brooks*^b had known nothing of the character of his customer, it cannot be supposed that he would have been unable to recover the hire of his brougham.³

Where the innocent party becomes aware of the illegal purpose of the transaction before it is completed or while it is still executory he may avoid the contract.⁴

Milbourn let a set of rooms to Cowan for certain days; then he discovered that Cowan proposed to use the rooms for the delivery of lectures which were unlawful because blasphemous within the meaning of 9 & 10 Will. III, c. 32; he refused, and was held entitled to refuse, to carry out the agreement.^c

If the innocent party to the contract discover the illegal purpose before it is carried into effect, it would seem that he could

^a *Waugh v. Morris*, (1878) L.R. 8 Q.B. 202.

^b (1866) L.R. 1 Ex. 213.

^c *Cowan v. Milbourn*, (1867) L.R. 2 Ex. 230.

¹ *Favor v. Philbrick*, (1834) 7 N.H. 326. And see *Fox v. Rogers*, (1898) 171 Mass. 546.

² An innocent party to an illegal contract has often been allowed to recover in American courts. *Rosenbaum v. United States Credit Co.*, (1900) 65 N.J. L. 255; *Congress Spring Co. v. Knowlton*, (1880) 103 U.S. 49; *Emery v. Kempton*, (1854, Mass.) 2 Gray, 257; *Kelley v. Riley*, (1871) 106 Mass. 339; *Chamberlain v. Beller*, (1858) 18 N.Y. 115; *Burkholder v. Beetem*, (1870) 65 Pa. 496.

³ The American student should remember that in the United States mere knowledge that an illegal act is contemplated is not generally enough; there must be an intent to participate in or further it. See *ante*, § 284.

⁴ *Church v. Proctor*, (1895) 66 Fed. 240. But see apparently to the contrary, *O'Brien v. Brietenbach*, (1857, N.Y.) 1 Hilt. 304.

not recover on the contract if he allowed it to be performed, and that the defendant in *Cowan v. Milbourn*^a could not have recovered the rent of his rooms, if, having let them in ignorance of the plaintiff's intentions, he allowed the tenancy to go on after he had learned the illegal purpose which his tenant contemplated.

5. Securities for money due on illegal transactions

267. Past illegal transaction. The validity of bonds or negotiable instruments given to secure the payment of money due or about to become due upon an illegal or void transaction, does not depend entirely upon the distinction which I have drawn between transactions which are illegal and those which are void.

A security may be given in consideration of a transaction which is wholly past. Here comes in the elementary rule that gratuitous promises are not binding unless they are under seal. Applying this rule to bonds and negotiable instruments, we may say that a bond under seal given in respect of a past transaction would be a valid promise, and that being wholly gratuitous, and founded on motive, a court of law would not inquire into the character of the motive.

Thus a bond given in consideration of past illicit cohabitation is binding because under seal;^b while a negotiable instrument given on such consideration would, as between the immediate parties, be invalid, not on the ground that the consideration was illegal, but because there was no consideration at all.^c

268. Present illegal transactions: securities under seal. As regards transactions which are pending or contemplated, we are met by an anomalous distinction which divides securities for our present purpose into three groups.

(1) Let us deal first with securities under seal.

If given for money due in respect of a *prohibited* transaction they are void.^d

^a (1867) L.R. 2 Ex. 230.

^c *Beaumont v. Reeve*, (1846) 3 Q.B. 483.

^b *Ayerst v. Jenkins*, (1872) 16 Eq. 375.

^d *Flaher v. Bridges*, (1854) 3 E. & B. 642.

¹ This case has been overruled as to the fact of the illegality of the particular object, but not as to the legal effect where an actually illegal purpose exists. *In re Bowman*, (1915) 2 Ch. 447; *Bowman v. Secular Society*, [1917] A.C. 406.

² *Brown v. Kinsey*, (1879) 81 N.C. 245; *Wyant v. Leasher*, (1854) 23 Pa. 338.

³ A promise not under seal upon such a consideration has been held to be unenforceable. *Drennan v. Douglas*, (1882) 102 Ill. 341; *Singleton v. Bremar*, (1824, S.C.) Harp. 201. But see *People v. Hayes*, (1893, N.Y.) 70 Hun, 111; *Smith v. Richards*, (1860) 29 Conn. 232; *Shenk v. Mingle*, (1825, Pa.) 13 S. & R. 29.

Fisher conveyed land to Bridges in order that it might be re-sold by lottery, a transaction forbidden under stringent penalties by 12 Geo. II, c. 28. After the land was conveyed, Bridges covenanted to pay a part of the purchase money by a fixed date, or failing this, by half-yearly installments. The Exchequer Chamber, reversing the judgment of the Queen's Bench, held that the covenant could not be enforced. It was given to secure a payment which became due as the result of an illegal transaction, and the bond was tainted with the illegality of the purpose it was designed to effect.¹

But a transaction may be only unlawful in the sense that it is avoided. In that case a security given in respect of it is on the same footing as a security given in respect of a transaction which is wholly past. It is valid if under seal; otherwise void as between the immediate parties.

A corporation borrowed money on mortgage without first obtaining the leave of the Lords of the Treasury; this was declared to be "unlawful" by the Municipal Corporations Act.^a But as they had received the money, and promised under seal to repay it, they were held bound by their promise.

"Is there anything in the Act which prohibits a corporation from entering into a covenant to pay its lawful debts? It is argued that § 94 renders this covenant void. But that section only says that it shall not be lawful to mortgage any lands of the corporation except with the approbation of the Lords of the Treasury, which was not obtained in this case; and although the mortgage may be invalid, that is no reason why the corporation should not be liable on their covenant to repay the mortgage money." ^b

260. Same. Negotiable instruments. (2) We now come to negotiable instruments.

^a 5 & 6 Will. IV, c. 76.

^b *Payne v. Mayor of Brecon*, (1858) 3 H. & N. 579.

¹ *Griffiths v. Sears*, (1886) 112 Pa. 523; *Watkins v. Nugen*, (1903) 118 Ga. 375; *Minzesheimer v. Doolittle*, (1899) 60 N.J. Eq. 394; *Blaedel v. Fowle*, (1876) 120 Mass. 447; *Luetchford v. Lord*, (1892) 132 N.Y. 465. The doctrine applies to an account stated, *Melchoir v. McCarty*, (1872) 31 Wis. 252; an award, *Hall v. Kimmer*, (1886) 61 Mich. 269; *Benton v. Singleton*, (1901) 114 Ga. 548; and has been extended to a judgment, *Emerson v. Townsend*, (1890) 73 Md. 224; *Boddie v. Brewer & Co.*, (1903) 204 Ill. 352; *Greer v. Hale*, (1898) 95 Va. 533; but see *contra* as to judgments, *Sample v. Barnes*, (1852, U.S.) 14 How. 70; and see *Black on Judgments* (2d ed.), §§ 331, 339.

² National banks are forbidden to loan money on real estate security. They may nevertheless enforce such securities against one who has had the benefit of the loan. This does not seem to proceed, however, upon the ground that the security is under seal, but upon the ground that the statute does not in terms make the transaction void. *National Bank v. Matthews*, (1878) 98 U.S. 621. See also *Holden v. Upton*, (1883) 134 Mass. 177; *Benton County Bank v. Boddicker*, (1898) 105 Iowa, 548. See *post*, § 271a, note.

In dealing with these we have to consider the effect of a flaw in their original making not only as between the immediate parties but as affecting subsequent holders of the instrument. And we may lay down the following rules:

A negotiable instrument made and given as security for a void, or illegal transaction, is, in either case *as between the immediate parties*, void. A promissory note was given in payment of a bet made on the amount of the hop duty in 1854. The bet was void by the Gaming Act of 1845, and the court was clear that as between the original or immediate parties the note was void also. There was no legal duty to pay the lost bet; and therefore no consideration for the note given to secure its payment.^{a 1} The position of the indorsee who brought the action shall be explained presently.

If the instrument is made and given to secure payment of money due or about to become due upon an *illegal* transaction a subsequent holder loses the benefit of the rule, as to negotiable instruments, that consideration is presumed till the contrary is shown: he may be called upon to show that he gave consideration, and that he knew nothing of the illegality, before he will be entitled to recover.²

But if the instrument has an honest origin the maker or acceptor cannot set up, as a defense against a subsequent indorsee, that the indorsement was made for an illegal consideration, unless he can show that he is injuriously affected by the transaction between indorser and indorsee.^b

If the instrument is given to secure payment of money due or about to become due upon a *void* transaction, it is as between the immediate parties void, but a subsequent holder is not prejudiced by the fact that the original transaction was avoided by statute.³

^a *Fitch v. Jones*, (1855) 5 E. & B. 245. ^b *Flower v. Sadler*, (1882) 10 Q.B.D. 572.

¹ *Embrey v. Jamison*, (1888) 131 U.S. 336; *Fareira v. Gabell*, (1879) 89 Pa. 89; *Greer v. Severson*, (1903) 119 Iowa, 84.

² *Negotiable Inst. Law*, §§ 55, 59 (N.Y. §§ 94, 98). See *Clark v. Pease*, (1860) 41 N.H. 414, *Huffcut's Neg. Inst.* 425. But if the statute declares a negotiable instrument given on some illegal consideration (e.g., for gambling debts, or usury) to be void, the *bona fide* holder for value cannot recover upon it.

³ A *bona fide* holder for value may enforce a negotiable instrument given upon an illegal or void consideration, unless the statute declares that such instrument shall be void. *New v. Walker*, (1886) 108 Ind. 365; *Sondheim v. Gilbert*, (1888) 117 Ind. 71; *Cranson v. Goss*, (1871) 107 Mass. 439; *Traders' Bank v. Alsop*, (1884) 64 Iowa, 97; *Glenn v. Farmers' Bank*, (1874) 70 N.C. 191. But he must show that he is a *bona fide* holder for value. The maker

Thomas Reynell was induced, by the fraud of Sprye, to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty. He sought to get the conveyance set aside in chancery. It was urged that the parties were *in pari delicto*, and that therefore his suit must fail; but the court was satisfied that he had been induced to enter into the agreement by the fraud of Sprye, and considered him entitled to relief.

"Where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given him."¹

In *Atkinson v. Denby*,^a the plaintiff, a debtor, offered his creditors a composition of 5s. in the pound. Denby was an influential creditor, whose acceptance or rejection of the offer might determine the decision of several other creditors. He refused to assent to the composition unless Atkinson would make him an additional payment of £50, in fraud of the other creditors. This was done: the composition arrangement was carried out, and Atkinson sued to recover the £50, on the ground that it was a payment made by him under oppression and in fraud of his creditors. It was held that he could recover; and the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, said:

"It is said that both parties are *in pari delicto*. It is true that both are *in delicto* because the act is a fraud upon the other creditors: but it is not *par delictum* because one has power to dictate, the other no alternative but to submit."²

273. Illegal purpose abandoned before its fulfillment. The third exception relates to cases where money has been paid, or

^a (1861) 6 H. & N. 778; (1862) 7 H. & N. 934.

¹ "Where the contract neither involves *moral turpitude* nor violates any general principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance: (1) Where he is not *in pari delicto*; or, (2) In some cases where he elects to disaffirm the contract while it remains *executory*." *Tracy v. Talmage*, (1856) 14 N.Y. 162, 181.

² Fraud, duress, undue influence, or overreaching, practised by one party upon the other may entitle the latter to relief from an illegal contract. *Duval v. Wellman*, (1891) 124 N.Y. 156; *Harrington v. Grant*, (1881) 54 Vt. 236; *Poston v. Balch*, (1878) 69 Mo. 115; *Insurance Co. v. Hull*, (1894) 51 Ohio St. 270; *Logan Co. Bk. v. Townsend*, (1891) 139 U.S. 67; *John T. Hardie Sons & Co. v. Scheen*, (1903) 110 La. 612; *Nat'l Bank v. Petrie*, (1903) 189 U.S. 423.

goods delivered, for an unlawful purpose which has not been carried out.

The law is not quite satisfactorily settled on this point, but its present condition may be thus stated.

In *Taylor v. Bowers*^a it was said by Mellish, L.J., that

"If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out: but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action."

The case to which these words applied was a fictitious assignment of goods in fraud of creditors; the contemplated fraud was not carried out and the plaintiff desired to recover his goods from one to whom they had been subsequently transferred under a bill of sale; and it was held that he was entitled to do so.¹ It is however difficult to say that the fictitious assignment was anything but a part-performance of the illegal purpose; and it is permissible to doubt whether the principle as stated in *Taylor v. Bowers*^b was correctly applied to the facts in that case.

Subsequent cases bear out this view. In *Kearley v. Thompson*,^c Messrs. Thompson, a firm of solicitors acting for the petitioner, creditor of Clarke, a bankrupt, agreed with Kearley, a friend of Clarke, that in consideration of the payment of their costs they would not appear at the public examination of Clarke, nor oppose the order for his discharge. They carried out the first part of the agreement, but before any application was made for Clarke's discharge Kearley sought to recover the money which he had paid on the ground that it was consideration for a promise to prevent the course of justice, and that the contract was not wholly carried out. The Court of Appeal, in a judgment indicating doubts as to the correctness of the decision in *Taylor v. Bowers*, held that Kearley could not recover.

"Suppose a payment of £100," said Fry, L.J., "by A to B on a contract that the latter shall murder C and D. He has murdered C but not D. Can the money be recovered back? In my opinion it cannot be. I think that case illustrates and determines the present one."^d

So also in another case a man procured another to go bail for him on the terms that he deposited the amount of the bail in

^a (1876) 1 Q.B.D. 291, 300.
^c (1890) 24 Q.B.D. 742.

^b (1876) 1 Q.B.D. 291.
^d At page 746.

¹ *Spring Co. v. Knowlton*, (1880) 103 U.S. 49 [but see *Knowlton v. Congress Spring Co.*, (1874) 57 N.Y. 518]; *Block v. Darling*, (1890) 140 U.S. 234.

the hands of his surety as an indemnity against his possible default. He sued his surety for the money on the ground that his contract was illegal, that no illegal purpose had been carried out, that the money was still intact, and that he could recover it. The Court of Appeal (overruling an earlier decision) held that the illegal object was carried out when by reason of the plaintiff's payment to his surety, the surety lost all interest in seeing that the conditions of the recognizance were performed.^{a 1}

Thus it would appear that the true rule is that where any part-performance of an illegal contract has taken place, money paid or goods delivered in pursuance of it cannot be recovered back.² But we must note two exceptional cases in this connection.

(1) *Marriage brokerage contracts.* Marriage brokerage contracts (though it is not easy to see why it should be so) constitute a genuine exception to the rule.

In *Hermann v. Charlesworth*^b a lady paid money to the proprietors of a newspaper with a view to obtaining by advertisement an offer of marriage. After advertisements had appeared, but before any marriage had been arranged, she brought an action to recover the money. It was argued on behalf of the defendant that, inasmuch as the contract had been in part performed, the action could not be maintained. But Collins, M.R., said:

"There was no objection at common law, till perhaps a hundred years ago, to such contracts; but the courts of equity took a different view, and in consequence the courts of common law modified their view of the matter and shaped their course accordingly. Equity did not take the view that in the case of a contract of this particular kind, tainted with illegality, a case for relief could only be considered when there had been a total failure of consideration. As was pointed out by Lord Hardwicke in *Cole v. Gibson*,^c equity reserves to itself the right to intervene even when something has been done in part performance of the contract, or even when the marriage has taken place."

On this broad ground, therefore, the plaintiff was held entitled to recover the money she had paid.³

(2) *Money placed with stakeholder.* There are numerous cases in which money has been placed in the hands of a stakeholder to abide the result of a wager; in such cases the money has been

^a *Hermann v. Jouchner*, (1885) 15 Q.B.D. 561.

^b [1906] 2 K.B. 123.

^c (1780) 1 Ves. Sen. 508.

¹ But see *Moloney v. Nelson*, (1899) 158 N.Y. 351.

² *Ullman v. St. Louis Fair Ass'n*, (1901) 167 Mo. 273.

³ *Duval v. Wellman*, (1891) 124 N.Y. 156; *Wenninger v. Mitchell*, (1909) 139 Mo. App. 420.

held to be recoverable from the stakeholder either before or after the determination of the wager, and even after the money has been paid to the winner, if before payment the authority to pay was withdrawn by the party seeking to recover.¹

It does not appear to matter whether the wager turns on the result of an unlawful transaction, or not: as between the parties the wager is no more than a void transaction.² Nor does the Gaming Act of 1892 affect the rights of the parties. Two cases will illustrate the law on this point.

Hampden put £500 into the hands of Walsh to abide the result of a bet that the earth was flat. He lost the bet, and before the money was paid he reclaimed his stake from Walsh. Walsh paid it to the winner, and was held bound to repay the amount to Hampden.^a

Pearson started a lottery styled "The Missing Word Competition."^b A sentence was published, omitting the last word, and an invitation was issued to the public, any one of whom might send a shilling and a word suitable to fill the vacant place in the sentence. Those who guessed the right word shared the sum thus collected.

The determination of the right word was reduced to an absolute uncertainty. One of a number of sealed packets, each containing a suitable word, was opened at hazard after the competition closed. This contained the Missing Word.

Such a lottery was unlawful, and penalized by 42 Geo. III, c. 119; but as between the various contributors the transaction was a simple wager in which each man deposited a shilling with a stakeholder to abide the chance of his guess.

The payments in one competition amounted to £23,000, and those who guessed the right word were 1358 in number: but before their shares could be paid over to them the competition was alleged to be illegal, and the money was paid into court. *Stir-*

^a *Hampden v. Walsh*, (1876) 1 Q.B.D. 189.

^b *Barclay v. Pearson*, [1893] 2 Ch. 154.

¹ *Bernard v. Taylor*, (1893) 23 Ore. 416; *Stoddard v. McAuliffe*, (1894) 81 Hun, 524, *aff'd* 151 N.Y. 671; *Pabst Brewing Co. v. Liston*, (1900) 80 Minn. 473. The matter is often regulated by statutes, which sometimes make the stakeholder liable even after he has paid the money over to the winner with the consent of the loser. *Ruckman v. Pitcher*, (1848) 1 N.Y. 392; *Storey v. Brennan*, (1857) 15 N.Y. 524. But in the absence of such a statute, payment by the stakeholder to the winner before notice of repudiation by the loser, exempts the stakeholder from further liability. *Goldberg v. Feiga*, (1896) 170 Mass. 146; *Adkins v. Flemming*, (1870) 29 Iowa, 122.

² See § 244, *ante*.

ling, J., found that the transaction was a lottery, and was unlawful; that the court could not aid in the distribution of the fund, but that each contributor might recover his shilling from Pearson, to whom he ordered the entire sum to be repaid in order that he might meet any legal claim.¹

These cases do not conflict with the principle of *Read v. Anderson*, nor with the decision in *Kearley v. Thompson*; they are cases of payment of money to an agent to be disposed of according to the principal's direction. The person employed is only a stakeholder and cannot suffer by the revocation of his authority; and the wager itself which is the object of the transaction is only void, not illegal, and so would not be affected by the unlawfulness of the lottery which brought together the parties to the wagers;² nor does the Gaming Act of 1892 affect the liabilities of a stakeholder.³

7. *Contracts lawful where made but unlawful in England*

274. **Cases involving a conflict of laws.** It is a general rule that a contract, valid according to its proper law, is actionable in the courts of this country. So far does this rule go that a contract for the purchase and delivery of slaves made, and to be performed, in Brazil, was held (two judges dissenting) to be actionable in this country on the ground that the contract was lawful in the place where it was made and was not distinctly prohibited by our law.⁴

But the judges who took this view stated that if the transaction "was an offense against the laws here," if it was "by Act of Parliament prohibited," it could not be enforced, even though the other contracting party might by the laws of his country enter into it.⁵ No suggestion was made that slavery was an offense

^a *Hastelow v. Jackson*, (1828) 8 B. & C. 225.

^b *Burge v. Ashley & Smith, Ltd.*, [1900] 1 Q.B. (C.A.) 744.

^c *Santos v. Illidge*, (1860) 8 C.B. (N.S.) 861.

¹ See *Ruckman v. Pitcher*, (1859) 20 N.Y. 9 (one staking in his own name \$3000, of which \$600 is his own money, the balance being contributed by various persons, can recover only his \$600 from the stakeholder). But a claim for the recovery of money staked or lost in wagers is assignable. *Meech v. Stoner*, (1859) 19 N.Y. 28.

² So also in *Roundtree v. Baker*, (1869) 52 Ill. 241 (note given for purchase price of slaves in Kentucky enforced in Illinois); *Osborn v. Nicholson*, (1871, U.S.) 13 Wall. 654.

³ "No principle of comity requires the courts of this state to recognize a contract which is regarded here as *contra bonos mores*." *Gist v. Telegraph Co.*, (1895) 45 S. Car. 344, 370 (a wagering contract although valid where made not enforced). "Contracts against good morals, and that tend to promote vice and crime, and contracts against the settled public policy of the

against morality, so grave that no dealings concerned with the purchase or delivery of slaves could be considered in English courts.

There is, however, authority to show that other conditions may exist, short of statutory prohibition, which would prevent our courts from enforcing a contract even though it may be valid by its proper law.

In *Hope v. Hope*^a an agreement was made in France for obtaining a divorce by collusion. The divorce proceedings were to take place in this country.

In *Grell v. Levy*^b an agreement, also made in France, provided for the recovery, by an attorney practicing in England, of a debt for his client half of which he was to retain for himself.

In each case the court declined to enforce the agreement. It should be noted that in each case the agreement was to be performed in this country, and that the one involved an interference with the course of justice, while the other not merely contemplated champerty but was made by an officer of the courts of this country.

On the other hand in *Saxby v. Fulton*,^c it was held that money lent for gaming at Monte Carlo, where gaming was lawful, could be recovered in England, because the various English statutes only "show that the policy of the legislature is to deal in a disciplinary fashion with certain particular manifestations of the gambling spirit, and do not establish a public policy which is contravened by any transaction connected with betting or games of chance." But no action will lie in any circumstances on a check given for money lent abroad for paying gaming debts, by reason of the operation of the Gaming Act of 1835; at any rate if the check is one payable in England.^d

A more difficult case is that of *Kaufman v. Gerson*.^e The husband of Mrs. Gerson, the defendant, living in France, had there appropriated to his own use money entrusted to him for other purposes, and was liable to criminal proceedings by French law. Kaufman threatened to prosecute, and Mrs. Gerson promised him a sum of money in consideration of his refraining from the course which he threatened.

^a (1857) 8 D.M. & G. 731. ^b (1864) 16 C.B., N.S. 73. ^c [1909] 2 K.B. 208 (C.A.).

^d *Moulis v. Owen*, [1907] 1 K.B. 746 (C.A.).

^e [1904] 1 K.B. (C.A.) 591.

state, will not be enforced, although they may be valid by the law of the place where they are made." *Swann v. Swann*, (1884) 21 Fed. 299 (Sunday contracts valid where made not within these exceptions). See also *Oscanyan v. Arms Co.*, (1880) 103 U.S. 261.

Such an agreement was valid by French law, but the Court of Appeal held that money due under it was not recoverable in this country because the moral pressure brought to bear upon the wife to compromise proceedings which would have brought discredit on her husband conflicted "with what are deemed to be in England essential public or moral interests."

It is true that an agreement obtained by moral pressure of the sort here exercised would not hold good if made in England and with the object of stifling an English prosecution;^a but the criminal proceedings which were compromised by the agreement in question were proceedings in the French courts, though the balance of the sum agreed to be paid was sought to be recovered here. It seems however that the English courts will in all cases reserve to themselves the power to decide whether the conduct of a plaintiff is such as to disentitle him to enforce a contract alleged to have been obtained by unfair means, whatever may be the view of a foreign law upon the subject; but the "essential public or moral interests" involved in *Kaufman v. Gerson* certainly appear slight as compared with those that *Santos v. Illidge* called in question — the purchase and sale of slaves.

It may well be, however, that the latter case would now be decided differently by an English Court.

On the whole, therefore, it is probably safe to say that a contract valid by its proper law and by the law of the place where it is to be performed is actionable in England, unless contrary to English ideas of public policy or morality;¹ but that the mere fact that it is one of a class made illegal by an English statute does not of itself necessarily bring it within this category.^b If, however, the contract is to be performed in England, the established rules of English law will prevail.

^a *Williams v. Bayley*, (1866) L.R. 1 H.L. 200.

^b *Re Fitzgerald*, [1904] 1 Ch. at p. 597 (C.A.).

¹ Gambling contracts valid where made have been held unenforceable in another state where they are prohibited. *Flagg v. Baldwin*, (1884) 38 N.J. Eq. 219; *Gooch v. Faucett*, (1898) 122 N.C. 270; *Pope v. Hanke*, (1894) 155 Ill. 617. So also lottery contracts. *Watson v. Murray*, (1872) 23 N.J. Eq. 257. But see *contra*, as to lottery contracts, *Kentucky v. Bassford*, (1844, N.Y.) 6 Hill, 526; *Ormes v. Dauchy*, (1880) 82 N.Y. 443; *McIntyre v. Parks*, (1841, Mass.) 3 Met. 207 (see criticism 8 Gray, 587).

In the following cases the contract though illegal in the state where action was brought was not regarded as falling within the exceptions to the rule of comity. *Hill v. Spear*, (1870) 50 N.H. 253 (sale of liquor); *Swann v. Swann*, (1884) 21 Fed. 299 (Sunday contract); *Brown v. Browning*, (1886) 15 R.I. 422 (Sunday contract); *Richardson v. Rowland*, (1873) 40 Conn. 565 (champerty).

PART III

THE OPERATION OF CONTRACT

274a. Legal analysis. American note.¹ In order to understand any legal system it is necessary to consider the purely *physical facts* of life apart from the *legal relations* that are consequent upon such facts. Legal relations are merely mental concepts which are useful in enabling us to foresee certain physical facts of the future.² Disregarding the multitudes of facts that have no effect whatever upon existing legal relations, those that remain — the *operative facts* — must be considered and classified. In any case, the best method of procedure is to consider each operative fact separately, and in chronological order, and to determine the legal relations that exist after such single fact.

Thus: *Fact one*, *A* says to *B*, "If you will agree to pay me \$100 for this horse you may have him and you may indicate your agreement by taking him." This is a physical fact, called an offer, consisting of certain muscular acts of *A* having certain physical results in *B*. The legal relations immediately following are (in part) as follows: *B* now has the *privilege* of taking the horse and *A* has *no-right* that he shall not; *B* has the *power* of making the horse his own by taking him, with the correlative *liability* in *A* to the loss of his ownership; no new *rights* or *duties* are created and no new *immunities* or *disabilities*; by giving *B* a privilege and a power, *A* has lost a previously existing right and an immunity.

Fact two, *B* says to *A* "How old is the horse?" This fact oper-

¹ By the American editor.

² For example, where *B* has borrowed \$100 of *A*, the transfer of the money and the promise to repay are physical acts of the two parties. The operative effect is that we say that a *right* exists in *A* and a *duty* in *B*, that *A* has the *privilege* of bringing suit, that *B* has the *power* of extinguishing *A*'s right and his own duty by payment, that *A* has the *power* of such extinguishment by release, and so forth. Here right, duty, privilege, and power are concepts by means of which we can foresee what society and its agents will do in the future. If *A* exercises his privilege of suing, society will not punish him. If *B* does not perform his duty, society will (after certain procedure) send the sheriff and seize *B*'s goods. If *B* exercises his power of payment, he thereby creates a privilege in himself and a no-right in *A*, and *B* will no longer be in danger of the sheriff.

ates to create no new legal relations whatever. The operative legal effect of fact one is still intact.

Fact three, *A*, knowing the horse to be 12 years old, replies "6 years." This false representation changes the character of *B*'s power by adding to it; he still has the power to make the horse his own by accepting the offer, but now his acceptance will create in addition the power to "rescind" on discovery of the fraud.

Fact four, *B* takes possession of the horse. This is the fact called *acceptance*. It operates at once to create all those multitudinous legal relations that are called "ownership" or "title" in *B* and to extinguish the ownership of *A*; also to create a *right* in *A* as against *B* and the correlative *duty* in *B* to pay \$100. Because of fact three, *B* also has the power to restore the legal *status quo* by tendering the horse back.

It is thus that each case should be analyzed and the legal relations determined. Any fact that causes new legal relations to exist is an *operative* fact. Any law book might properly be entitled, therefore, the legal Operation of Facts.

Why, then, should we speak of the "operation of contract"? There is perhaps no very good reason except past usage. Beyond doubt, that usage is subject to criticism because of its lumping together of many facts and legal relations under such general terms as *contract*, *ownership*, *title*, *property*, and the like. Their complexity and their shifting content gravely complicate every legal problem and cause misunderstanding, conflict in decisions, and injustice. Nevertheless, they are terms that we cannot as yet refrain from using. And so likewise it is probably still desirable to divide the history of contractual relations between two persons into three periods: first, the period of Formation; second, the period subsequent thereto but prior to discharge, including Interpretation, the determination by Construction of law of the legal relations caused by the acceptance and by subsequent facts such as part Performance and Breach; third, Discharge and the legal relations thereafter.

The author's term "operation of contract," therefore, involves a consideration of the second period above described. Assuming that a valid contract has been formed (and this includes offer, acceptance, consideration, capacity of parties, legality of purpose, and the absence of such antecedent facts as are described by the terms fraud, duress, etc.) what is its operative effect? What legal relations exist subsequently to acceptance and between what persons do they exist? What acts are

required by law in the way of performance, and when and on what conditions are they required? If they are not performed as required, what new legal relations will then exist? All this is here included under the term "operation of contract."

It must not be supposed, however, that this term is of any importance in itself, or that this classification is of any great value. The important thing is to isolate each new fact as it occurs and to determine the legal operation of that fact. And that legal operation must be analyzed into its various distinct relations — the relations described as right — duty, privilege — no-right, power — liability, and immunity — disability.

CHAPTER VIII

The Relations between Contractors and Third Persons

275. **Introductory.** We come now to deal with the effects of a valid contract when formed, and to ask, To whom does the obligation extend? Who have rights and liabilities under a contract? ¹

And then this further question arises, Can these rights and liabilities be assigned or pass to others than the original parties to the contract?

In answer to these questions we may lay down two general rules.

(1) No one but the parties to a contract can be bound by it or entitled under it. ²

(2) Under certain circumstances the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, either (a) by act of the parties, or (b) by rules of law operating in certain events.

These two rules seem at first to look like one rule subject to certain exceptions, but they are in fact distinct. The parties cannot, by their agreement, confer rights or impose liabilities, in respect of the agreement, upon any but themselves. But they may by certain methods and under certain circumstances drop

¹ A complete understanding of the operation of contract requires a fuller analysis of the jural relations constituting a contract than the author here gives us. The reader is referred to an article on "Fundamental Legal Conceptions as Applied in Judicial Reasoning," by Professor W. N. Hohfeld, 23 *Yale Law Journal*, 16, 26 *id.* 710. Contractual relations consist of rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities. (The author of this book no doubt uses "liability" to include "duty.") These relations are logically distinct and are easily severable. It can easily be seen that contracting parties might be able to confer a *right* upon a third person, a *privilege* upon a fourth, a *power* upon a fifth, and an *immunity* upon a sixth, without being able to charge any of them with a *duty* or a *liability* or to deprive any of them of a right or of a power previously possessed. In any specific case the analysis should be clearly made so as to determine just what change in the legal relations of men the parties have attempted to make. This will be insisted upon in the notes hereafter.

² In the United States generally John Doe and Richard Roe may by their contract confer rights upon John Styles. See *post*, § 284.

out of the obligation so created, and be replaced by others who assume their rights or liabilities under the contract.

Thus — (1) If John Doe contracts with Richard Roe, their contract cannot impose liabilities or confer rights¹ upon John Styles.

(2) But there are circumstances under which John Doe or Richard Roe may substitute John Styles for himself as a party to the contract, and there are circumstances under which the law would operate to effect this substitution.

276. General English rules. The general rule that a person who is not a party to a contract cannot be included in the rights and liabilities which the contract creates — cannot sue or be sued upon it — is an integral part of our conception of contract. A contract is an agreement between two or more persons, by which an obligation is created, and those persons are bound together thereby. If the obligation takes the form of a promise by *A* to *X* to confer a benefit upon *M*, the legal relations of *M* are unaffected by that obligation.² *He* was not a party to the agreement; *he* was not bound by the *vinculum juris* which it created; the breach of that legal bond cannot affect the rights of a party who was never included in it.

Nor, again, can liability be imposed on *M* by agreement between *A* and *X*. In contract, as opposed to other forms of obligation, the restraint which is imposed on individual freedom is voluntarily created by those who are subject to it — it is the creature of agreement.

277. Exceptions: agency and trust. The relation of principal and agent may from one point of view be held to form an exception to these rules. It needs at any rate a separate chapter.³

A trust has this in common with contract, that it originates in agreement, and that among other objects it aims at creating obligations. If we could place a trust upon the precise footing of

¹ In the United States generally John Doe and Richard Roe may by their contract confer rights upon John Styles. See *post*, § 284.

² American students must note from the outset of this chapter that the law in most of the states is contrary to the law of England upon this point. See *post*, § 284 *et seq.* If the "*vinculum juris*" were a *physical* rope, it might not be possible to control the person bound by it without having hold of it. But the "*vinculum juris*" is merely a complex mental concept, and the term itself is merely a description in *figurative* language of a group of legal relations. This shows the danger that lies in figurative descriptions of legal relations. By an unconscious shift a mere physical impossibility may become a conceptual or legal one.

³ Certainly the case of an undisclosed principal who may sue and be sued upon a contract between his agent and a third person is a clear exception to both rules. See Hufcut on Agency, §§ 118-22.

inasmuch as there was no privity between them and Schmaling; that is to say, that there was nothing either by writing, words, or conduct to connect them with him in the transaction. X had been employed by them to do the whole work, and there was no "pretense that the defendants ever authorized them to employ any other to do the whole under them: the defendants looked to X only for the performance of the work, and X had a right to look to the defendants for payment, and no one else had that right."^{a 1}

279. Duty not to interfere with contract rights. Law of torts. A contract cannot impose the burdens of an *obligation* upon one who was not a party to it; yet a *duty* rests upon persons, though extraneous to the obligation, not to interfere, without sufficient justification, with its due performance. I speak of duty as that necessity which rests upon all alike to respect the rights which the law sanctions; and reserve the term obligation for the special tie which binds together definite, assignable members of the community.²

Lumley v. Gye. Lumley, being the manager of an opera house, engaged a singer to perform in his theatre and nowhere else. Gye induced her to break her contract. Action was brought, and it was argued that a party to a contract might sue any one who induced the other party to the contract to break it: and that if this general proposition could not be maintained an action would still lie for inducing a servant to quit the service of his master.

^a *Schmaling v. Thomlinson*, (1815) 6 Taunt. 147.

¹ This decision can perhaps be justified on the ground that performance was personal and therefore the defendant owed nothing for the reason that the consideration was not performed. But if the contract did not require personal performance by X as a condition precedent to the right to the money, then the decision could be no longer supported under modern law. *Schmaling* is an assignee of money duly earned by X. Mere lack of privity is no longer a sufficient reason for denying a recovery. By the procedure of 1815 the assignee would have had to sue in the name of the assignor. See chap. x, *post*.

Subject to the foregoing limitations, it is true that an agent cannot render his principal liable to a sub-agent, or the sub-agent to the principal, unless the principal has authorized the appointment of a sub-agent. *Fairchild v. King*, (1894) 102 Cal. 320. It is often a nice question as to whether there is such authority to create a contract for the principal with the sub-agent. *Exchange Nat. Bk. v. Third Nat. Bk.*, (1884) 112 U.S. 276; *Guelich v. National State Bank*, (1881) 56 Iowa, 434; *Dun v. City Nat. Bk.*, (1893) 58 Fed. 174; *Huffcut on Agency*, §§ 92-95.

² This sentence shows the inadequacy of the terms used. "Duty" is not a "necessity," but is a single definite legal relation between two persons. "Obligation," if it means more than "duty," is a term of complex and uncertain signification; it should not be restricted to contracts alone.

The relation of master and servant has always given the master a right of action against one who enticed away his servant, and so the court was called upon to answer two questions: Does an action lie for procuring a breach of any contract? If not, then does the special rule applicable to the contract of master and servant apply to the manager of a theatre and the actors whom he engages?

The majority of the court answered both these questions in the affirmative.^a

Later cases. No similar case arose until 1881, when *Bowen v. Hall*^b came before the Court of Appeal, offering precisely the same points for decision as *Lumley v. Gye*. The majority of the court, setting aside the question whether the relation of master and servant affected the rights of the parties, held that a man who induces one of two parties to a contract to break it, *intending thereby to injure the other, or to obtain a benefit for himself*, does that other an actionable wrong. In both these cases it will be observed that the element of motive was introduced, and that the judges appeared to consider the malicious intention to injure as necessary to make the inducement of a breach of contract actionable. This view was negatived in *Quinn v. Leatham*,^c where Lord Macnaghten thus laid down the law.

"The decision [in *Lumley v. Gye*] was right, not on the ground of malicious intention — that was not I think the gist of the action — but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference."

In the case of the *South Wales Miners Federation v. Glamorgan Coal Co.*^d no malice or ill-will was suggested, and the defendants, under circumstances which they honestly, though wrongly, regarded as furnishing sufficient justification, "counseled and procured" a breach of contract on the part of a number of miners. It was held that they had committed an actionable wrong.¹

^a *Lumley v. Gye*, (1858) 2 E. & B. 216. In the elaborate dissenting judgment of Coleridge, J., the exception which the law of master and servant seems to have engrafted upon the common law is traced by the learned judge, in a detailed historical argument, to the Statutes of Laborers, and is held to be inapplicable to the case of a theatrical performer.

^b (1881) 6 Q.B.D. 333.

^c [1901] A.C. 495.

^d [1905] A.C. 239.

¹ Inducing a breach of contract is generally held to be actionable. *Walker v. Cronin*, (1871) 107 Mass. 555; *Jones v. Stanly*, (1877) 76 N.C. 355; *Doremus v. Hennessy*, (1898) 176 Ill. 608. But in a few states it is necessary to show that unlawful means (force or fraud) were used. *Boyson v.*

There is a clear distinction between inducing *A* to break his contract with *X*, and inducing *A* not to enter into a contract with *X*. The man who induces another to break a contract induces him to do what is in itself actionable: but no liability attaches to the refusal to make a contract. Consequently, where *A* is induced not to contract with *X*, the inducement, if it is to be actionable, must be of an unlawful kind, as for example acts of coercion and intimidation; or, again, where there is a conspiracy by more than one person to injure; for "numbers may annoy and coerce, where one may not."^a

But this general rule of law, it must be remembered, does not now hold good where, "in contemplation of a trade dispute," *A* induces *X* to break his contract with *M*; for here the Trade Disputes Act, 1906,^b relieves *A* from all liability. Save, however, in the case of trade disputes, the law as stated above remains unaltered.

2. The acquisition of rights by third party beneficiaries¹

280. Promise for benefit of third person. English rule. This rule needs fuller explanation than the one which we have just been discussing. "My Lords," said Lord Haldane in *Dunlop v. Selfridge*, "in the law of England certain principles are fundamental. One is that only a person who is a party to a contract

^a *Quinn v. Leatham*, [1901] A.C. 511, 538.

^b 6 Edw. VII, c. 47, § 3.

Thorn, (1893) 98 Cal. 578; *Chambers v. Baldwin*, (1891) 91 Ky. 121; *Bourlier Bros. v. Macauley*, (1891) 91 Ky. 135. See *Ashley v. Dixon*, (1872) 48 N.Y. 430.

Inducing the *termination* of a contract terminable at will (not therefore a breach of contract) is actionable if unlawful means be used. *Benton v. Pratt*, (1829, N.Y.) 2 Wend. 385; *Rice v. Manley*, (1876) 66 N.Y. 82; *London &c. Co. v. Horn*, (1904) 206 Ill. 493. And the general rule is that it is actionable if there be no justifiable cause. *Moran v. Dunphy*, (1901) 177 Mass. 485. Inducing the *non-formation* of a contract is actionable if unlawful means be used. *Sherry v. Perkins*, (1888) 147 Mass. 212; *Martell v. White*, (1904) 185 Mass. 255. It is by no means clear, however, that the American courts regard a conspiracy or combination as necessarily unlawful means. *National Protective Ass'n v. Cumming*, (1902) 170 N.Y. 315. See discussion *pro* and *con* in *Vegelahn v. Guntner*, (1896) 167 Mass. 92. Many courts lay down the broader rule that inducing the non-formation of a contract is actionable unless it be justified, as for example on the ground of competition. *Walker v. Cronin*, (1871) 107 Mass. 555; *Dels v. Winfree*, (1891) 80 Tex. 400; *Hitchman Coal & C. Co. v. Mitchell*, (1917) 245 U.S. 229. But see *National Protective Ass'n v. Cumming*, *supra*; *Park & Sons Co. v. Nat. Druggists' Ass'n*, (1903) 175 N.Y. 1. See 62 L.R.A. 673, 694-719 note.

For a statement of the New York law, see 18 *Harvard Law Review*, 423.

¹ For the American law under this head, see §§ 284-301, *post*.

can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*."^a It is contrary to the common sense of mankind that *M* should be bound by a contract made between *X* and *A*. But if *A* and *X* make a contract in which *X* promises to do something for the benefit of *M*, all three may be willing that *M* should have all the rights of an actual contracting party; or if *A*, and a group of persons which we will call *X*, enter into a contract, it might be convenient that *M* should be able to sue on behalf of the multitude of which *X* consists.

If *A* makes a promise to *X*, the consideration for which is a benefit to be conferred on *M* by *X*, this cannot confer a right of action on *M*. Such is the rule of English law.

Easton promised *X* that if *X* would work for him he would pay a sum of money to Price. The work was done, and Price sued Easton for the money. It was held that he could not recover because he was not a party to the contract.

The judges of the Queen's Bench stated in different forms the same reason for their decision. Lord Denman, C.J., said that the plaintiff did not "show any consideration for the promise moving from him to defendant." Littledale, J., said, "No privity is shown between the plaintiff and the defendant." Taunton, J., that it was "consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between *X* and the defendant": and Patteson, J., that there was "no promise to the plaintiff alleged."^b

Doubts have been thrown on this rule in two sorts of case, and these we will consider, premising that the rule itself remains unshaken.

281. Nearness of kin to promisee. It was at one time thought that if the person who was to take a benefit under the contract was nearly related by blood to the promisee a right of action would vest in him. The case of *Tweddle v. Atkinson*^c is conclusive against this view.

M and *N* married, and after the marriage a contract was entered into between *A* and *X*, their respective fathers, that each should pay a sum of money to *M*, and that *M* should have power to sue for such sums. After the death of *A* and *X*, *M* sued the

^a [1915] A.C., 847, 853.

^b *Price v. Easton*, (1838) 4 B. & Ad. 433.

^c (1861) 1 B. & S. 393.

executors of *X* for the money promised to him. It was held that no action would lie. Wightman, J., said:

"Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason* (1 Ventr. 6) in which it was held that the daughter of a physician might maintain *assumpsit* upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."

282. The doctrine in equity. Equity judges have used language, sometimes very explicit, to the effect that "where a sum is payable by *A* for the benefit of *B*, *B* can claim under the contract as if it had been made with himself."^a

Articles of association adopting contracts of promoters. The question has most frequently arisen in cases where contracts have been made or work done on behalf of a company which has not yet come into existence. The company when formed cannot (for reasons which are discussed later) ratify such transactions, and attempts have been made to bind it by introducing into the articles of association a clause empowering the directors to fulfill the terms of the contract, or to repay those who have given work or advanced money to promote the existence of the company.^b

Common-law judges have uniformly held that no right of action accrues to the beneficiary under such a provision; and recent decisions put this matter on a plain footing and tell us when a third party may or may not sue.^c

The articles of association of a company provided that the plaintiff should be employed as its permanent solicitor. He sued the company for a breach of contract in not employing him.^d

In considering a case of this kind we must distinguish *articles of association* from a *memorandum of association*. The memorandum contains the terms which confer and limit the corporate powers of the company. The articles regulate the rights of the members of the company *inter se*.^e

^a *Touche v. Metropolitan Warehousing Co.*, (1871) 6 Ch. 671. [See § 285, *infra*, note 4.]

^b *Spiller v. Paris Skating Rink*, (1878) 7 Ch. D. 368. See as to rules which govern ratification, § 445, *post*.

^c *Melhado v. Porto Alegre Railway Co.*, (1874) L.R. 9 C.P. 503.

^d *Eley v. Positive Assurance Co.*, (1876) 1 Ex. D. (C.A.) 88 (recovery denied).

^e See *Ashbury Carriage Co. v. Riche*, (1875) L.R. 7 H.L. at p. 667.

"They are," said Lord Cairns, "an agreement *inter socios*, and in that view if the introductory words are applied to article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now so far as that is concerned it is *res inter alios acta*, the plaintiff is no party to it. This article is either a stipulation which would bind the members, or else a mandate to the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff."^a

Articles of association, therefore, only bind the parties to them, and the plaintiff could not recover.

The impression that in any such case a third party who is to be benefited acquires equitable rights *ex contractu* arises, as was explained by Jessel, M.R., in the case of the *Empress Engineering Company*,^b from the fact that an agreement between two parties might well be so framed as to make one of them trustee for a third. But if a trust is to be created in favor of a third party, there must be words amounting to a declaration of trust by one of the contracting parties.¹ It is not enough that one should promise the other to pay money to a third. Whether a trust has or has not been created must be matter of construction, as may be seen by reference to the cases of *Murray v. Flavell*,^c and *Re Rotherham Alum Co.*^d It is sufficient to say that a document intended to be a conveyance or a contract will not be construed as a declaration of trust because it happens to be inoperative for the purpose for which it was intended.^e

Unincorporated associations with numerous members. It has been attempted, without success, to break the general rule in the case of unincorporated companies and societies who wish to avoid bringing action in the names of all their members. To this end they introduce into their contracts a term to the effect that their rights of action shall be vested in a manager or agent. Thus in *Gray v. Pearson*,^f the managers of a mutual assurance company, not being members of it, were authorized, by powers of attorney executed by the members of the company, to sue upon contracts made by them as agents on behalf of the company. They sued upon a contract so made, and it was held that they could not maintain the action, "for the simple reason, — a reason not applicable merely to the procedure of this country, but

^a *Eley v. Positive Assurance Co.*, (1876) 1 Ex. D. (C.A.) at p. 89.

^b (1890) 16 Ch. D. (C.A.) 135.

^c (1883) 28 Ch. D. 89.

^d *Ibid.*, 103.

^e *Richards v. Delbridge*, (1874) L.R. 18 Eq. 11.

^f (1870) L.R. 5 C.P. 568.

¹ In some cases, at least, this distinction becomes a barren technicality, depending solely upon a mere form of words.

one affecting all sound procedure, — that the proper person to bring an action is the person whose right has been violated.”¹

The inconvenience under which bodies of this description labor has been met in many cases by the legislature. Certain companies and societies can sue and be sued in the name of an individual appointed in that behalf,^{a 2} and the Rules of the Supreme Court made under the powers given by the Judicature Act provide that —

“Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the court to defend in such action on behalf of all the parties so interested.” (Order XVI, r. 9.)

Under this rule any person may sue in a representative capacity who has a common interest and a common grievance with those whom he claims to represent; thus, for instance, several persons claiming preferential rights to stalls in Covent Garden market as growers of fruit within the meaning of a certain Act, were held entitled to sue on behalf of the whole class of such growers.^b This rule was meant to apply the former practice of the Court of Chancery to actions brought in any division of the High Court, and is not confined (as held in *Temperton v. Russell*^c) to persons having some common “beneficial proprietary right.”

283. Special doctrines of agency. But although *A* cannot by contract with *X* confer rights or impose liabilities upon *M*, yet *A* may represent *M*, in virtue of a contract of employment subsisting between them, so as to become his mouthpiece or medium of communication with *X*. This employment for the purpose of representation is the contract of agency. I have described elsewhere the difficulty of assigning to Agency a fit place in a treatise on the law of contract. I regard it as an extension of the limits of contractual obligation by means of representation, but, since its treatment here would constitute a parenthesis of somewhat uncouth dimensions, I will postpone the treatment of it to the conclusion of my book.

^a Statutes of this nature are —

7 Geo. IV, c. 46, relating to Joint Stock Banking Companies;

7 Will. IV, and 1 Vict. c. 78, relating to chartered companies;

34 & 35 Vict. c. 31, relating to Trades Unions;

59 & 60 Vict. c. 26, relating to Friendly Societies;

and in many cases companies formed by private Acts of Parliament possess similar statutory powers.

^b *Duke of Bedford v. Ellis*, [1901] A.C. 1.

^c [1893] 1 Q.B. (C.A.) 435.

¹ But the third party beneficiary is that very person if the courts see fit to hold that he has a *right*.

² See N.Y. Code Civ. Proc. § 1919; *Goodsell v. Western Union Tel. Co.*, (1892) 130 N.Y. 430.

CHAPTER IX

Contracts for the Benefit of Third Persons in the United States ¹

284. **Introductory.** By the great weight of authority in the United States the same facts that operate to create contractual relations between the offeror and the acceptor may also operate to create rights in a third person.² It may be useful, therefore, to examine in detail the nature and limits of this doctrine and to classify and discuss the cases in distinct groups.

To many students and practitioners of the common law *privity of contract*³ became a fetish. As such, it operated to deprive many a claimant of a remedy in cases where according to the *mores* of the time the claim was just. It has made many learned men believe that a *chose in action* *could not* be assigned. Even now, it is gravely asserted that a man cannot be made the debtor of another against his will. But the common law was gradually influenced by equity and by the law merchant, so that by assignment a debtor could become bound to pay a perfect stranger to himself, although until the legislature stepped in, the common-law courts characteristically made use of a fiction and pretended that they were not doing that which they really were doing.

285. **Trust beneficiaries.** If without privity of contract, one may become *indebted* to another, the lack of privity is surely no reason for denying him a beneficial right. As usual, equity saw this more clearly than the common law.⁴ No privity is neces-

¹ By the American editor. This has been published in substantially the same form in 27 *Yale Law Journal*, 1008, and is reproduced here by consent.

² See 13 C.J. 705, § 815, citing more than 350 cases; 6 R.C.L. 884, § 271; Wald's *Pollock, Contracts*, (Williston's ed, 1906) 237-78.

³ In order that *privity* of contract may exist, it seems to be necessary for A to say to B "I promise you." It requires the voluntary selection of each party by the other. See criticism of the term *privity* in 15 *American Law Review*, 244-45. For recent adherence to the fetish, see 6 R.C.L. 885, § 271.

⁴ Equity did not shrink from expanding the concept of a trust to cover the case of a contract beneficiary. See *Tomlinson v. Gill*, (1756) Ambler, 330, before Hardwicke, L.C.; *Moore v. Darton*, (1851) 4 DeG. & Sm. 517; *Lloyds v. Harper*, (1880, C.A.) 16 Ch. D. 290; *Gregory v. Williams*, (1817) 3 Mer. 582; *Page v. Cox*, (1851) 10 Hare, 163; *Touche v. Metrop. W. Co.*, (1871) L.R. 6 Ch. 671, 677. See also *School District v. Livers*, (1899) 147 Mo. 580; *Forbes v. Thorpe*, (1911) 209 Mass. 570; *Grime v. Borden*, (1896) 166 Mass. 198; *Nash v. Commonwealth*, (1899) 174 Mass. 335.

sary to create rights in a *cestui que trust*, and no consideration need move from him. If it was possible and desirable for equity to recognize the very extensive rights, powers, privileges, and immunities of a *cestui que trust*, it is equally possible, and it appears to the American courts to be equally desirable, to recognize similar relations between a promisor and a contractual beneficiary. It is no answer to say that in the one case the magic words "in trust" were used, while in the latter they were not. This would be mere fetish worship once more. It may be that the rights, powers, privileges, and immunities of a *cestui que trust* are more numerous and valuable than are those of a contract beneficiary. The *cestui que trust*, without privity and without giving value, gets so much; — should not the contract beneficiary be given at least a crumb? ¹

It may be argued that in the case of trust there is a specific *res*, while in the case of the contract there is not. This is also a distinction that proves nothing. Suppose there is a specific physical *res* — its mere *existence* is no reason for creating rights in a beneficiary without privity and without value given by him. In many cases of trust, however, there is no physical *res*. The trust *res* is then said to consist of the *rights* and *powers* of the trustee, which he "holds" in trust and must exercise for the benefit of the *cestui que trust*. If such an unreal *res* may be the basis of rights in a beneficiary, there is no greater difficulty in the case of contract.

The reasons for recognizing rights in the contract beneficiary are substantially the same as those underlying the rights of a *cestui que trust*. By so doing the intention of the parties is carried out and the beneficiary's just expectations are fulfilled. The reason is not, as has sometimes been suggested, that the promisee was acting as the agent of the third party.² He was not in fact so acting and nobody supposed that he was. Nor is the beneficiary's right to be explained on some theory of subrogation.³

286. Possession of assets by the promisor. In nearly all of the American jurisdictions, including those that deny a right of

¹ See *Pennsylvania Steel Co. v. New York City R. Co.*, (1912) 198 Fed. 721, 749. Lord Mansfield in *Martyn v. Hind*, (1776) Cowp. 437, 443, said it was a matter of surprise how a doubt could have arisen in a case like *Dutton v. Poole*, (1677) 2 Lev. 210.

² See opinion of Johnson, C.J., and Denio, J., in *Lawrence v. Fox*, (1859) 20 N.Y. 268; *Union Inst. v. Phoenix Ins. Co.*, (1907) 196 Mass. 230. In accord with the text is the opinion of Finch, J., in *Gifford v. Corrigan*, (1889) 117 N.Y. 257.

³ See discussion below in connection with mortgagee-beneficiaries, § 290.

action to most third party beneficiaries, there is one sort of beneficiary who is given a right of action. "Where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person," the beneficiary can maintain an action at law in his own name.¹ These cases essentially recognize that a beneficiary can acquire a legal right without privity and without giving consideration. In some such cases a true equitable trust may exist with respect to some specific *res*. In most such cases, however, this is not so. If there is a trust and a specific *res*, the duty of the promisor should be held to be merely the duty to account. The fact is that the duty enforced against the promisor is that of a *debtor*.² Some of these cases may properly be regarded as based upon the quasi-contractual doctrine of unjust enrichment, in which case the defendant's duty is limited by the value received by him. By the great majority of courts, however, it is regarded as unjust for the promisor not to perform as he promised in return for a consideration; and the beneficiary's right is dependent upon neither a specific *res* nor an unjust enrichment, but upon the existence of a valid contract.³

287. Plaintiff a promisee, but consideration given by another.
In some cases the promise is made to the plaintiff, but the con-

¹ See *National Bank v. Grand Lodge*, (1878) 98 U.S. 123; *Hall v. Marston*, (1822) 17 Mass. 575; *Fitch v. Chandler*, (1849, Mass.) 4 Cush. 254; *Mellen v. Whipple*, (1854, Mass.) 1 Gray, 317; *Exchange Bank v. Rice*, (1871) 107 Mass. 37. And see cases cited in 13 C.J. 704, §§ 809, 810. A recent Massachusetts case says that the plaintiff's right is "in equity"; but this does not affect the character of the right and the duty, for the defendant is treated as a debtor and not as a trustee. *Forbes v. Thorpe*, (1911) 209 Mass. 570. Cf. *Borden v. Boardman*, (1892) 157 Mass. 410. A remedy at law was denied in *Morgan v. Randolph & Clowes Co.*, (1900) 70 Conn. 396.

The "assets" here referred to are assets in the hands of the promisor and do not include the *promisee* itself, which is sometimes regarded as an asset of the promisee.

² For example, where a devise given on condition that a certain sum be paid to a beneficiary is accepted by the devisee, the latter is a debtor to the beneficiary irrespective of the value of the devise. *Felch v. Taylor*, (1832, Mass.) 13 Pick. 133; *Adams v. Adams*, (1867, Mass.) 14 Allen, 65; *Olmstead v. Brush*, (1858) 27 Conn. 530; *Brown v. Knapp*, (1879) 79 N.Y. 136; *Flickinger v. Saum*, (1884) 40 Ohio St. 591; *Porter v. Jackson*, (1884) 95 Ind. 210; *LaValle v. Droit*, (1913) 179 Ill. App. 484; *Etter v. Greenawalt*, (1881) 98 Pa. 422. See also *Feldman v. McGuire*, (1899) 34 Ore. 309.

³ The plaintiff's action, therefore, may be *assumpsit* for unliquidated damages as well as debt for a specific sum. His action lies also where the defendant has assumed to settle a claim for unliquidated damages that the plaintiff had against the promisee. Likewise the beneficiary has been given an injunction for the enforcement of a negative covenant. *Ferris v. Amer. Brewing Co.*, (1900) 155 Ind. 539.

sideration moves from a third party. Here the plaintiff is a promisee and there is no lack of *privity*. The problem is merely one as to consideration. It is the English law that the consideration must move from the promisee.¹ Such is not the American law as generally laid down by our courts,² and some of the cases draw a clear distinction between a promise to the plaintiff upon a consideration moving from another³ and a promise to X for the benefit of the plaintiff upon a consideration moving from X. In some cases the promise seems to be made simultaneously to both the plaintiff and the one furnishing the consideration.⁴ Where a promise is made to two persons jointly, it seems not to be questioned whether the consideration must move from both. No doubt a fiction is indulged and the joint promisees are regarded as a unity. Where the beneficiary is not himself the promisee, he can always establish a sufficient "privity" to satisfy the courts by obtaining an assignment from the promisee. He will then possess whatever rights the promisee had as well as such rights as a beneficiary as may be recognized in the particular jurisdiction.⁵

288. Donee-beneficiaries and sole beneficiaries. In many cases the purpose of the promisee in securing a promise for the benefit of a third party is to confer a gratuitous benefit upon that third party. In such cases this third party will usually be the only person who will be benefited by the promised performance; he will be the sole beneficiary.⁶ Performance will not benefit the

¹ *Dunlop v. Selfridge*, [1915] A.C. 847.

² *Van Eman v. Stanchfield*, (1879) 10 Minn. 255; *Rector v. Teed*, (1890) 120 N.Y. 583; *Palmer Sav. Bk. v. Insurance Co.*, (1896) 166 Mass. 189. See also *Gardner v. Denison*, (1914) 217 Mass. 492.

³ In *First N.B. v. Chalmers*, (1895) 144 N.Y. 432, 439, the court says: "I do not deem the doctrine of *Lawrence v. Fox*, (1859) 20 N.Y. 268, involved in this controversy. That doctrine applies where no express promise has been made to the party suing, but he claims the right to rest upon a promise between other parties having respect to the debt due to him and as having been made for his benefit. It struggles to obviate a lack of privity upon equitable principles, but is needless and has no proper application where the privity exists, and a direct promise has been made upon which the action may rest." See also *De Cicco v. Schweiser*, (1917, N.Y.) 117 N.E. 807, and the dissenting opinion of Comstock, J., in *Lawrence v. Fox*, (1859) 20 N.Y. 268.

⁴ *Bouton v. Welch*, (1902) 170 N.Y. 554; *Furbish v. Goodnow*, (1867) 98 Mass. 296.

⁵ *Hyland v. Crofut*, (1913) 87 Conn. 49; *Reed v. Paul*, (1881) 131 Mass. 129; *Litchfield v. Flint*, (1887) 104 N.Y. 543; *Societa Italiana v. Sulser*, (1893) 138 N.Y. 468.

⁶ The plaintiff may be a donee-beneficiary even though he is not the sole beneficiary. In such case he can maintain suit. *Jenkins v. Chesapeake & O.R. Co.*, (1907) 61 W.Va. 597.

promisee; he is to receive nothing, and such performance will not discharge any duty of the promisee, for he owes none to the beneficiary. If the purpose is to discharge some duty owed by the promisee to the third party, the latter is not a donee.

It is clear that a *sole beneficiary* should be allowed to enforce the contract, and great numbers of cases have so held.¹ It was once suggested by the United States Supreme Court² that a sole beneficiary was the only kind who could sue, on the ground that to allow a creditor-beneficiary to sue would subject the promisor to two suits for breach.³ On the other hand, the New York courts long repeated the rule that no beneficiary could sue unless he was a creditor (or an obligee) of the promisee.⁴ Neither of these limitations, contradictory to each other as they are, should be sustained.

Some cases have decided in favor of a donee-beneficiary on the ground of a relationship by blood or marriage between the beneficiary and the promisee.⁵ Such relationship is an evidential fact

¹ *In re Edmundson's Estate*, (1918, Pa.) 103 Atl. 277; *Rogers v. Galloway Female College*, (1896) 64 Ark. 627 (beneficiary of a charitable subscription); *St. Louis v. Von Phul*, (1895) 133 Mo. 561; *Todd v. Weber*, (1884) 95 N.Y. 181 (promise to the mother of plaintiff to furnish support. See other cases of this type in note 5, *infra*); *Whitehead v. Burgess*, (1897) 61 N.J. L. 75; *Bouton v. Welch*, (1902) 170 N.Y. 554; *Pond v. New Rochelle W. Co.*, (1906) 183 N.Y. 330 (promise to a village for the benefit of the inhabitants); *Rigney v. New York Central R.R. Co.*, (1916) 217 N.Y. 31 (same); *Smyth v. New York*, (1911) 203 N.Y. 106 (same); *Independent Sch. Dist. v. Le Mars Water Co.*, (1906) 131 Iowa, 14; *Doll v. Crume*, (1894) 41 Neb. 655; *Gorrell v. Water Co.*, (1899) 124 N.C. 328; *Tweeddale v. Tweeddale*, (1903) 116 Wis. 517; *Simons v. Bedell*, (1898) 122 Cal. 341 (specific performance decreed). *Contra*, *Knights of the Maccabees v. Sharp*, (1910) 163 Mich. 449. See further 22 L.R.A. (N.S.) 492; 39 L.R.A. (N.S.) 151; 49 L.R.A. (N.S.) 1166.

² *National Bank v. Grand Lodge*, (1878) 98 U.S. 123. By statute, this rule seems to prevail in the Virginias. *Newberry Land Co. v. Newberry*, (1897) 95 Va. 119; *King v. Scott*, (1915) 76 W.Va. 58.

³ The rights of the promisee are discussed below, § 296.

⁴ *King v. Whitely*, (1843, N.Y.) 10 Paige, 465 [but see *Thorp v. Keokuk C. Co.*, (1872) 48 N.Y. 253]; *Vrooman v. Turner*, (1877) 69 N.Y. 280; *Durnherr v. Rau*, (1892) 135 N.Y. 219; *Jefferson v. Asch*, (1893) 53 Minn. 446. Their substantial abandonment of this doctrine will be indicated below. Nevertheless the doctrine continues to influence the decisions in many states in certain classes of cases. See the sections (290 and 292) below on "Mortgage-beneficiaries" and "Liability of Water Companies."

⁵ *Dutton v. Poole*, (1877) 2 Lev. 210; *In re Edmundson's Estate*, (1918, Pa.) 103 Atl. 277; *Daily v. Minnick*, (1902) 117 Iowa, 563; *Benge v. Hiatt*, (1885) 82 Ky. 666; *Schmerhorn v. Vanderheyden*, (1806, N.Y.) 1 Johns, 139; *Todd v. Weber*, *supra*; *Coleman v. Whitney*, (1889) 62 Vt. 123. *Contra*, *Linneman v. Moroes*, (1893) 98 Mich. 178.

In the following cases, it is believed, the relationship by blood or marriage

to show that the promisee truly intended that the third party should receive a benefit, and indicates the *causa* — the reason or motive — for which he paid the consideration. But the intention to benefit the third party can be clearly shown by the express words of the contract, or by other evidence, and relationship should not be held to be a necessary operative fact.¹

In *life insurance* the beneficiary is usually a sole beneficiary, and in all jurisdictions he can maintain suit on the policy. In England and a few of our states, this result was attained by statute.² It would indeed create a scandal to deny him a right of action either because he was not the promisee or because he gave no consideration.

289. Creditor-beneficiaries. Where the third party is a creditor of the promisee, or has a right against him for some particular performance, the purpose with which the promisee contracts with the promisor may be to induce the latter to pay the debt or otherwise to discharge the third party's claim. In such case, performance will directly benefit both the third party (the creditor or claimant) and the promisee. The third party is not a donee and is not a *sole* beneficiary. Although not the first case of the sort, the famous case of *Lawrence v. Fox*³ is now regarded as the leading authority to the effect that a creditor-beneficiary has an enforceable right. Here a money debt of \$300 was owed by Holly to Lawrence, and he had that sum ready to be paid. Fox borrowed the money over night, promising Holly to pay the debt to Lawrence next day. It was held that Lawrence could maintain suit against Fox to enforce this promise. For a good many years this decision was severely criticised, the critics being obsessed with the idea that privity was logically necessary. Fine

caused the court to strain the facts and to hold, contrary to the fact, that the beneficiary was also a promisee: *De Cicco v. Schweiser*, (1917, N.Y.) 117 N.E. 807; *Gardner v. Denison*, (1914) 217 Mass. 492; *Eaton v. Libbey*, (1896) 165 Mass. 218; *Freeman v. Morris*, (1907) 131 Wis. 216. In the following cases such relationship caused the court to hold that the promisee owed the beneficiary a legal or an equitable duty when in fact there was none: *Buchanan v. Tilden*, (1899) 158 N.Y. 109; *Seaver v. Ransom*, (1917, App. Div.) 168 N.Y. Supp. 454; *aff'd* Cf. App. Oct. 1, 1918. Cf. *Opper v. Hirsch*, (1901) 68 N.Y. Supp. 879.

¹ It now seems to be assumed to be the settled law of England that blood relationship will not enable a beneficiary to sue. *Tweddle v. Atkinson*, (1861) 1 B. & S. 393. But *Dutton v. Poole*, *supra*, is not overruled.

² In Massachusetts the beneficiary's right has been said to be in equity only. *Nims v. Ford*, (1893) 159 Mass. 575. It is not apparent on casual inspection why the procedural statute, R.L. 1902, c. 159, § 8, should not sustain an action of "contract."

³ (1859) 20 N.Y. 268.

distinctions were often drawn so as to avoid following this decision, but in spite of some confusion thus caused, the great weight of authority is in harmony with it and a creditor-beneficiary can maintain suit.¹

290. Mortgagee-beneficiaries. One of the most frequent cases where a third party attempts to enforce a contract on the theory that he is a beneficiary is that of a mortgagee. A mortgagee is nearly always to be regarded as the creditor of somebody, but he may not be the creditor of the *promisee*. Where a mortgagor who is himself personally indebted sells his interest in the mortgaged property to a grantee who assumes payment of the mortgage debt, the mortgagee is a *creditor-beneficiary*, and he is almost universally allowed to maintain suit against the grantee and to get a personal judgment against him for the amount of the debt.²

¹ *Bohanan v. Pope*, (1856) 42 Me. 93; *Joalin v. New Jersey Car Spring Co.*, (1873) 36 N.J. L. 141; *Barker v. Bucklin*, (1846, N.Y.) 2 Den. 45; *Wood v. Moriarty*, (1887) 15 R.I. 518; *Zell's Appeal*, (1886) 111 Pa. 532, 547; *Ballard v. Home Nat'l Bank*, (1913) 91 Kan. 91, L.R.A. 1916 C, 161, and note. See 25 L.R.A. 257, note; 13 C.J. 705, § 815, citing hundreds of cases.

Where a new partner enters a firm and promises the old members to pay a share of the previous debts he may properly be sued by the creditors. *Arnold v. Nichols*, (1876) 64 N.Y. 117; *Lehow v. Simonton*, (1877) 3 Colo. 346; *Dunlap v. McNeil*, (1871) 35 Ind. 316; *Floyd v. Ort*, (1878) 20 Kan. 162; *Hannigan v. Allen*, (1891) 127 N.Y. 639; *Clafin v. Ostrom*, (1874) 54 N.Y. 581; *Maxfield v. Schwartz*, (1890) 43 Minn. 221; 13 C.J. 709. It was once held that a promise to pay one-half or some other fraction of all the previous debts cannot be enforced by any creditor because no single creditor can well show that it is for his benefit. *Wheat v. Rice*, (1884) 97 N.Y. 296; *Serviss v. McDonnell*, (1887) 107 N.Y. 260; distinguished in *Hannigan v. Allen*, *supra*. *Contra*, *Johnson v. McClung*, (1885) 26 W.Va. 659.

Where a mortgagor insures premises and the policy is made payable to the mortgagee as his interest may appear, the mortgagee can sue the insurer. *Union Ins. v. Phoenix Ins. Co.*, (1907) 196 Mass. 230 (on theory of agency); *Palmer Savings Bank v. Ins. Co.*, (1896) 166 Mass. 189. *Contra*, *Minnock v. Eureka F. & M.I. Co.*, (1892) 90 Mich. 236.

Where a municipality owes a duty to travelers to keep a street in repair and makes a contract with the defendant for the latter to do this, a traveler who is injured can sue the defendant by virtue of this contract. *Jenree v. Metrop. St. Ry. Co.*, (1912) 86 Kan. 479; *McMahon v. Second Ave. R. Co.*, (1878) 75 N.Y. 231. See many other cases of this sort cited in 49 L.R.A. (N.S.) 1166, note.

See further, mortgagee-beneficiary cases, *infra*.

A very few states still hold that a creditor-beneficiary cannot sue in a common-law action. *Morgan v. Randolph & Clowes Co.*, (1900) 73 Conn. 396; *Mellen v. Whipple*, (1854, Mass.) 1 Gray, 317; *Exchange Bank v. Rice*, (1871) 107 Mass. 37; *Borden v. Boardman*, (1892) 157 Mass. 410; *Minnock v. Eureka F. & M.I. Co.*, (1892) 90 Mich. 236; *Edwards v. Thoman*, (1915) 187 Mich. 361; *National Bank v. Grand Lodge*, (1878) 98 U.S. 123.

² *Gifford v. Corrigan*, (1889) 117 N.Y. 257; *Thorpe v. Keokuk Coal Co.*,

Suppose, however, that the mortgagor sells his interest to a grantee who buys subject to the mortgage but who makes no promise whatever to pay the mortgage debt. He does not "assume the mortgage debt." In such a case, the grantee's rights *in rem* are limited by the mortgage,¹ but he undertakes no *duty* to pay the debt. The mortgagee, therefore, can maintain no action against him, and neither can the grantor. Such a grantee, however, has in numerous cases sold his interest to a second grantee and has caused the latter to assume payment of the mortgage debt. There is here an express promise the performance of which requires a payment directly to the mortgagee. The first grantee is the promisee, and he will not be benefited at all by the payment. So far as the promise is concerned, therefore, the mortgagee seems to be a mere *donee-beneficiary* and the sole beneficiary. At this point the decisions are found to be hopelessly at variance.² Those holding that the mortgagee can sue the promisor in these cases seem to be more nearly consistent with the weight of authority in other beneficiary cases. Those holding the contrary generally do so on the ground that a third party cannot enforce a contract unless the performance will operate not only as a benefit to him, but also as the fulfillment of a legal or an equitable duty owing by the promisee to him. This rule

(1872) 48 N.Y. 253, 257; *Burr v. Beers*, (1861) 24 N.Y. 178; *Gay v. Blanchard*, (1880) 32 La. Ann. 497; *Pope v. Porter*, (1887) 33 Fed. 7; *Urquhart v. Brayton*, (1878) 12 R.I. 169; *Carver v. Eads*, (1880) 65 Ala. 190; *Allen v. Bucknam*, (1883) 75 Me. 352; *Figart v. Halderman*, (1881) 75 Ind. 567; *Huyler v. Atwood*, (1875) 26 N.J. Eq. 504; *George v. Andrews*, (1882) 60 Md. 26; *Cooper v. Foss*, (1884) 15 Neb. 515. *Contra* in the Virginias, where by statute only a *sole* beneficiary can sue: *Newberry Land Co. v. Newberry*, (1897) 95 Va. 119; *King v. Scott*, (1915) 76 W.Va. 58.

See, further, cases cited in 13 C.J. 707, § 816. In Michigan and Connecticut a mortgagee-beneficiary can sue by virtue of a special statute. *Mich. Comp. Laws*, 1897, § 519; *Corning v. Burton*, (1894) 102 Mich. 86; *Conn. G.S.* 1902, § 587.

¹ The grantee lacks many rights and immunities because of the mortgage; he has certain "no-rights" because the mortgagee has privileges, and he has liabilities because the mortgagee has powers.

² *The mortgagee can sue*: *McDonald v. Fineth*, (1915) 32 N.D. 400; *Casselman v. Gordon*, (1916) 118 Va. 553; *Llewellyn v. Butler*, (1915) 186 Mo. 525; *Thorp v. Keokuk Coal Co.*, *supra*; *Dean v. Walker*, (1883) 107 Ill. 540; *Marble Sav. Bank v. Mesarvey*, (1897) 101 Iowa, 285; *Crone v. Stinda*, (1900) 156 Mo. 262; *Hare v. Murphy*, (1895) 45 Neb. 809; *McKay v. Ward*, (1899) 20 Utah, 149; also many other cases in accord, cited in *Fry v. Ausman*, *infra*.

Contra: *Fry v. Ausman*, (1912) 29 S.D. 30; 39 L.R.A. (N.S.) 150, citing many other cases; *Vrooman v. Turner*, (1877) 69 N.Y. 280; *Ward v. DeOca*, (1898) 120 Cal. 102. See note in 22 L.R.A. (N.S.) 492.

was laid down during the period when many of the courts desired to limit the application of the rule of *Lawrence v. Fox*.¹ It denies all donee-beneficiaries a remedy, and is being abandoned.²

Some of the cases denying the mortgagee a remedy under these circumstances rest upon the theory that a beneficiary's right is based upon the equitable doctrine of subrogation. It is generally held in equity that a creditor is not only entitled to sue his principal debtor and all collateral sureties and to realize on such securities as may have been charged with the debt, but also to make use of all securities that the principal debtor may have given to the surety for the indemnity of the latter.³ It is also held that where one assumes the debt of another, although the latter is not thereby discharged, he occupies thereafter the position of a surety and the new promisor occupies the position of a principal debtor. Thus where the promisee is himself indebted to the mortgagee, but has become, under the above theory, a mere surety by reason of his contract with the new promisor, the courts may resort to the doctrine of subrogation and sustain an action by the mortgagee against the promisor because the promisee could have maintained such an action. On the other hand, if the promisee is not himself bound to pay the debt, he is not a surety and the doctrine of subrogation is not applicable.

It appears, however, that this is a very doubtful ground upon which to sustain the action of the mortgagee (or other beneficiary) against the promisor. The doctrine of subrogation has no doubt been very beneficial in spite of fiction and artificiality; but in this instance it has been used to confer new security and new rights upon a creditor, as a gift out of a clear sky. In suretyship it is used only as against one who is already legally indebted in order to secure the fulfillment of that legal duty. A doctrine whose purpose was the enforcement of a previously recognized duty cannot properly be given as the sole reason for creating an entirely new duty.⁴

¹ *Jefferson v. Asch*, (1893) 53 Minn. 446; *Vrooman v. Turner*, (1877) 69 N.Y. 280; *Durnherr v. Rau*, (1892) 135 N.Y. 219.

² See discussion of *donee-beneficiaries*, *ante*; also *post*, "New York Law." Modern decisions are: *Buchanan v. Tilden*, (1899) 158 N.Y. 109; *Pond v. New Rochelle Water Co.*, (1906) 183 N.Y. 330; *De Cicco v. Schweizer*, (1917, N.Y.) 117 N.E. 807; *Gardner v. Denison*, (1914) 217 Mass. 492.

³ *Brandt, Suretyship* (3d ed.), § 357; *Sheldon, Subrogation* (2d ed.), § 154; *Spencer, Suretyship*, § 181; *Ames, Cases on Suretyship*, 620 and note; *Keller v. Ashford*, (1890) 133 U.S. 610; *Hopkins v. Warner*, (1895) 109 Cal. 133.

⁴ The extension of the subrogation theory to cover this case, where the promisor was not indebted to the third party by reason of any operative fact

To rest the beneficiary's right to recover on such a theory as this would shut out all donee (or non-creditor) beneficiaries altogether, yet they are the very persons once thought by the Supreme Court of the United States to be the *only* beneficiaries who should be permitted to sue on a promise made to another person.¹ Included among such beneficiaries are most of the persons for whose benefit life insurance policies are issued.

The mortgagee's right against the promisor should rest on the same ground as the right of other beneficiaries. The promisor has undertaken for a sufficient consideration to perform an act that will be beneficial to the third party. If such benefit was the contemplated result, and if judgment and execution in favor of the third party will give effect to the intention of the promisor and of the party giving the consideration, there is ample justification for sustaining action by the beneficiary.

Some of the cases denying the mortgagee a remedy may perhaps be justified for the reason that the contracting parties had no intention of benefiting the mortgagee or of conferring a right of action upon him. Indeed, some of them are placed squarely on this ground.² But it is believed that where the promisor has received consideration for a promise the fulfillment of which necessarily requires him to pay money directly to a mortgagee or other third person, it would seem not unreasonable to draw an invariable inference that such third person was contemplated as a beneficiary and as the holder of a new and additional right of action.

291. Incidental and unintended beneficiaries. These are persons not intended by the contracting parties to have new rights, and not named as beneficiaries or even as the persons to whom payment is to be made or other performance given. In order

other than his promise to the promisee, is merely a cumbrous intellectual expedient for holding that a contract between two parties can create an enforceable right in a third, e.g., see *Keller v. Ashford*, (1889) 133 U.S. 610, 623.

¹ See *Nat'l Bank v. Grand Lodge*, (1878) 98 U.S. 123.

The Virginia court regards the fact that the promisee was not bound to pay the debt as showing that the mortgagee was necessarily the "sole beneficiary" within the meaning of the Va. Code, § 2415, giving such a beneficiary a remedy. *Casselman v. Gordon*, (1916) 118 Va. 553. See also *Merriman v. Moore*, (1879) 90 Pa. 78; *Davis v. Davis*, (1912) 19 Cal. App. 797. Under such a statute it was held that the mortgagee could not sue the grantee of one who was himself personally indebted. *King v. Scott*, (1915) 76 W.Va. 58.

² See *Fry v. Ausman*, (1912) 29 S.D. 30; *King v. Scott*, (1915) 76 W.Va. 58.

that a third party may sue upon a contract made by others he must show that he was intended by them to have an enforceable right or at least that the performance of the contract must necessarily be of benefit to him and such benefit must have been within the contemplation and purpose of the contracting parties.¹ He has no right of action where he incidentally finds a provision in some contract which makes to his advantage. On this ground a remedy has, in some instances, been refused to a material man suing on a builder's bond conditioned on paying all claims for material,² and likewise to a citizen who sues on a contract between a water company and the municipality.³ It is not always easy to determine in fact whether or not the plaintiff was contemplated by the parties as a beneficiary, and much of the apparent conflict in decisions can be explained on this ground. Where the beneficiary is a *sole* beneficiary, the difficulty does not exist; but in the case of creditor-beneficiaries the question may always be regarded as an open one. If the intention to create a right in a third party is indicated with reasonable certainty, an action by him should be maintainable even though the intention to benefit him was only secondary and conditional,⁴ and irrespective of whether he is a donee or a creditor. Where the agreed performance involves a payment direct to the third party, the enforcement of the contract by him will carry out the intention of the parties.

292. Liability of water companies. Where a water company has contracted with a municipality to maintain a certain supply of water for the putting out of fires and has failed to do so, with

¹ *Durnherr v. Rau*, (1892) 135 N.Y. 219; *Wheat v. Rice*, (1884) 97 N.Y. 296; *Campbell v. Lacock*, (1861) 40 Pa. 448; *Adams v. Kuehn*, (1888) 119 Pa. 76; *Miller v. Winchell*, (1877) 70 N.Y. 437; *Case v. Case*, (1911) 203 N.Y. 263; *Lockwood v. Smith*, (1913) 143 N.Y. Supp. 480; *Thomas Mfg. Co. v. Prather*, (1898) 65 Ark. 27; *Buckley v. Gray*, (1895) 110 Cal. 339. In *New Orleans St. J. Ass'n v. Magnier*, (1861) 16 La. Ann. 338, the plaintiff was denied a remedy because performance of the defendant's primary contractual duty would not have benefited the plaintiff, although the plaintiff was expressly named as beneficiary of a penalty clause. This decision should not be followed. See further 13 C.J. 709.

² *Standard Gas Power Corp. v. New England Casualty Co.*, (1917, N.J.) 101 Atl. 281, 27 *Yale Law Journal*, 274. Cf. *School District v. Livers*, (1899) 147 Mo. 580. See § 301, *infra*, as to statutory provisions. Many cases *contra* are cited in 49 L.R.A. (N.S.) 1166, note.

³ *Davis v. Clinton Water Co.*, (1880) 54 Iowa, 59; *Boston Safe D. & T. Co. v. Salem W. Co.*, (1899) 94 Fed. 238. *Contra*, *Gorrell v. Greensboro W. Co.*, (1899) 124 N.C. 328. See further *post*, "Liability of Water Companies."

⁴ For this reason the decision in *New Orleans St. J. Ass'n v. Magnier*, *supra*, should be disapproved.

the result that the property of an individual citizen has been destroyed, it is very generally held that the citizen has no claim against the water company for breach of contract.¹ Various reasons are given for these decisions. Sometimes they are made to rest solely upon the lack of privity, without observing that this is inconsistent with other cases in the same jurisdiction allowing beneficiaries to maintain suit. In other cases it is asserted that the contract was not made for the benefit of the citizens, an assertion that would seem to be generally untrue in fact; and in others it is said that the municipality had no legal power to make such a contract for the benefit of its citizens, a statement that we may be permitted to doubt as a matter of law. Most of the cases denying any right to the citizen have done so for the reason formerly given by the New York courts in all beneficiary cases, to the effect that no beneficiary can sue unless the performance by the promisor will discharge some legal or equitable duty of the promisee to the beneficiary. This reason has already been shown to be unsound, as denying rights to all donee-beneficiaries. Also it has been practically abandoned by the courts of New York where it was invented. In all cases of this class the rights of the citizen will vary with the words used by the parties in the express contract; but if a water company contract is in fact for the benefit of third persons they should have the same right of action that other beneficiaries have.²

¹ *Lovejoy v. Bessemer W. Co.*, (1906) 146 Ala. 374; *Town v. Ukiah W. & Imp. Co.*, (1904) 142 Cal. 173; *Fowler v. Waterworks Co.*, (1889) 83 Ga. 219; *Bush v. Water Co.*, (1895) 4 Ida. 618; *Peck v. Sterling W. Co.*, (1905) 118 Ill. App. 533; *Fitch v. Seymour W. Co.*, (1894) 139 Ind. 214; *Davis v. Clinton W. Co.*, (1880) 54 Iowa, 59; *Becker v. Keokuk Waterworks*, (1890) 79 Iowa, 419; *Mott v. Water Co.*, (1892) 48 Kan. 12; *Allen v. Shreveport W. Co.*, (1905) 113 La. 1091; *Hone v. Presque-Iale W. Co.*, (1908) 104 Me. 217; *Wilkinson v. Water Co.*, (1900) 78 Miss. 389; *Howsman v. Trenton W. Co.*, (1893) 119 Mo. 304; *Eaton v. Fairbury Waterworks*, (1893) 37 Neb. 546; *Ferris v. Carson W. Co.*, (1881) 16 Nev. 44; *Wainwright v. Queens Co. W. Co.*, (1894) 78 Hun, 146; *Blunk v. Dennison W. Co.*, (1904) 71 Ohio St. 250; *Beck v. Kittanning W. Co.*, (1887, Pa.) 11 Atl. 300; *Ancrum v. Camden W. Co.*, (1909) 82 So. Car. 284, 21 L.R.A. (N.S.) 1029, 64 S.E. 151; *Foster v. Lookout W. Co.*, (1879, Tenn.) 3 Lea, 42; *House v. Houston W. Co.*, (1895) 88 Tex. 233; *Britton v. Green Bay W. Co.*, (1892) 81 Wis. 48; *Boston Safe D. & T. Co. v. Salem W. Co.*, (1899) 94 Fed. 238; *Met. Trust Co. v. Topeka W. Co.*, (1904) 132 Fed. 702. *Contra*: *Woodbury v. Tampa Waterworks*, (1909) 57 Fla. 243, 21 L.R.A. (N.S.) 1034; *Paducah Lumber Co. v. Paducah W. Sup. Co.*, (1889) 89 Ky. 340; *Gorrell v. Greensboro W. Sup. Co.*, (1899) 124 N.C. 328; and see *Planters' Oil Mill v. Monroe W. & L. Co.*, (1900) 52 La. Ann. 1243, later overruled.

² See Arthur L. Corbin, "Liability of Water Companies," (1910) 19 *Yale Law Journal*, 425, where the cases are collected and the possible

293. **Contracts under seal.** The fact that the parties to a contract have executed a formal instrument under seal should not affect the rule as to a third party beneficiary's right to sue. If the right of a beneficiary is recognized at all, it should be recognized in the case of contracts under seal, and there is much authority to this effect.¹ Many of the courts, however, make the presence of a seal a reason for refusing to recognize a right in the beneficiary.²

294. **The beneficiary's right is not based on novation.** It has been held in a few cases that the third party beneficiary must elect between his former debtor and the new promisor, and that a suit against either one, even though it does not result in collection, will bar any action against the other.³

The theory underlying these cases, though not expressed clearly, seems to be that the agreement between the promisor and promisee operates as an offer of a novation to the beneficiary. The chief objection to this theory is that in fact the parties contemplate no such offer and the beneficiary has no reason to believe that in taking advantage of the new contract he is extinguishing his previous rights. If such an offer is in fact made and accepted, the case no longer falls under the present heading. Where a novation is effected, there is a new contract between the promisor and the new promisee, and the latter is not a beneficiary of a contract between other persons. Instead, he is a *promisee* and he has given valuable consideration by discharging his previous debtor.

In the absence of a novation, there seems to be no sufficient reason for holding that the beneficiary's attempt to enforce the duty created by the new contract amounts to a discharge of his previous rights against the promisee. The history of the law of

liability in tort is also considered. Individual citizens are very generally allowed to sue transportation companies and other public service companies on contracts made with the municipality. See note in 49 L.R.A. (N.S.) 1166.

¹ *Bassett v. Hughes*, (1877) 53 Wis. 319; *Hughes v. Oregon R. & Nav. Co.*, (1884) 11 Ore. 437; *Coster v. Albany*, (1871) 43 N.Y. 399; *Pond v. New Rochelle W. Co.*, (1906) 183 N.Y. 330; *King v. Scott*, (1915) 76 W.Va. 58, 84 S.E. 954 (Code 1913, § 3740); *Newberry Land Co. v. Newberry*, (1897) 95 Va. 119 (Code 1904, § 2415). See further 13 C.J. 711, § 818.

² *Harms v. McCormick*, (1889) 132 Ill. 104; *Hendrick v. Lindsey*, (1876) 93 U.S. 143; *Willard v. Wood*, (1890) 135 U.S. 309; *Crowell v. Hospital*, (1876) 27 N.J. Eq. 650.

³ *Bohanan v. Pope*, (1856) 42 Me. 93; *Wood v. Moriarty*, (1887) 15 R.I. 518; *Warren v. Batchelder*, (1845) 16 N.H. 580. See also *Aldrich v. Carpenter*, (1893) 160 Mass. 166.

discharge at common law justifies no such holding, and no sufficient reason appears for inducing equity to intervene and to discharge the promisee. In like manner, a suit by the beneficiary against his former debtor should not affect his rights against the new promisor.

Where the beneficiary is not a creditor of the promisee he has no rights to discharge, and the novation theory is wholly inapplicable. Clearly also, the better authority appears to be that the creditor-beneficiary's right against the new promisor is an additional security.¹ This carries out the real intention of the parties.

295. Character of the third party's right. The right of a third party beneficiary should be described as a legal right and as a contractual right. It is contractual because the operative facts creating it are acts of offer and acceptance; the party who assumes the duty does so by consenting thereto, and the necessary consideration is the same as that required for any contract. Upon breach of the primary duty by the promisor, the secondary right of the beneficiary may be a right to damages collectible in express *assumpsit*; the beneficiary is not restricted to an action of debt or *indebitatus assumpsit* for the amount of the defendant's unjust enrichment. Indeed, in most cases it is held that the promisor need not have received anything at all; it is merely necessary that the promisee shall have given consideration for the promise. There is no particular reason therefore for describing the right and the duty as *quasi*-contractual. We cannot properly say that the promisor and the third party have made a contract, even though the third party has assented; the contract was made by the promisor and the promisee. The assent of the third party is certainly not the acceptance of an offer, and the third party gives no consideration. Nevertheless, the right of this party and the duty of the promisor are properly described as contractual.

There is no sufficient reason for describing the third party's

¹ *Fischer v. Hope Mut. Life Ins. Co.*, (1877) 69 N.Y. 161; *Rodenbarger v. Bramflett*, (1881) 78 Ind. 213; *Davis v. Hardy*, (1881) 76 Ind. 272; *Gay v. Blanchard*, (1880) 32 La. Ann. 497, 505 ("True, there was no novation of the debt. There was simply an additional obligor bound for it."); *Feldman v. McGuire*, (1899) 34 Ore. 309; *Smith v. Pfluger*, (1905) 126 Wis. 253, 105 N.W. 476. See also *Poe v. Dixon*, (1899) 60 Ohio St., 124.

This is necessarily true in mortgagee-beneficiary cases where the court bases the mortgagee's right against the grantee who has assumed the debt upon the doctrine of subrogation. See *Hopkins v. Warner*, (1895) 109 Cal. 133.

right as an equitable right instead of a legal one. The recognition of the third party's right has very largely come about in jurisdictions where there have never been separate courts of common law and of equity; and even in other jurisdictions the right has been enforced in the courts of law as well as in equity. Moreover, in fundamental character, there is no difference between an equitable right and a legal right. Any *right*, legal or equitable, implies a duty of performance by another, the non-performance being penalized by society. Its existence does not depend upon the number of officials or courts to whom application must be made or upon the complexity of the machinery of enforcement, although these may determine what the secondary and other subsequent rights will be. The term equitable has often meant in the past that application must be made to a chancellor in a particular form called a "bill" and that the societal penalty for non-performance will be of a particular kind. It no longer has that definite meaning; and if it has such a meaning it is inapplicable in this instance.

In the past, certain rights have been described as equitable because there was a liability to their extinguishment for the benefit of some innocent purchaser. Certain admittedly legal rights were likewise subject to such a liability by the rules of market overt, and hence the existence of such a liability is not the basis of a clear distinction. The right of the third party beneficiary, however, is accompanied by no liabilities that do not accompany all contract rights. The fact that the promisee may have the power of extinguishment is not material on this point. There is no chance here for the application of special *bona fide* purchaser doctrines.¹

The accuracy of the foregoing seems not to be doubted in the case of a *sole* beneficiary. In the case of a creditor-beneficiary, however, the contrary has been maintained, especially in cases where the court overlooked altogether the rights of a sole beneficiary. Thus it has been held that a mortgagee or other creditor can sue the promisor only according to the procedure of a court of equity, and on the theory that the promise is an "asset" of the promisee.² Not only is such a theory wholly inapplicable to

¹ The relation between a beneficiary and the promisor is not a *fiduciary* one. *Attorney General v. American Legion of Honor*, (1910) 206 Mass. 158.

² *Keller v. Ashford*, (1889) 133 U.S. 610; *Green v. Turner*, (1898) 80 Fed. 41, 86 Fed. 837; *Hopkins v. Warner*, (1895) 109 Cal. 133; *Forbes v. Thorpe*, (1911) 209 Mass. 570. Observe that this asset theory is different from the one discussed previously. Here the promissory duty is the asset, and is to

promisee no longer has power to release the promisor from his duty to the beneficiary.¹ This is true whether the relation of the beneficiary to the promisee is that of donee or that of creditor. No notice of his assent by the beneficiary to the promisor is necessary.² Prior to assent by the beneficiary the promisee may perhaps have the power to release.³ Where the third party is the sole beneficiary of the contract the promisee is generally held to have no power whatever to release the promisor, even before the third party is aware of the contract.⁴

298. Defenses of the promisor as against the beneficiary. The beneficiary's rights against the promisor spring from the contract as it was made, and if that contract was in the beginning void for lack of any essential element the third party has no rights. So likewise if the contract was voidable for infancy or insanity or fraud, it is voidable as against the beneficiary.⁵ If the duty of the promisor is subject to some condition precedent, the correlative right of the beneficiary is likewise conditional.⁶

On the other hand, just as soon as the right of the beneficiary is in existence and beyond the power of the promisee to destroy by a release or rescission, it is also beyond his power to destroy by wrongful acts that would discharge the promisor's duty to

¹ *Gifford v. Corrigan*, (1889) 117 N.Y. 257; *New York Ins. Co. v. Aitken*, (1891) 125 N.Y. 660; *Hill v. Hoeldtke*, (1912) 104 Tex. 594, 142 S.W. 871; 40 L.R.A. (N.S.) 672, with note; *Bassett v. Hughes*, (1877) 43 Wis. 319.

"The person who has made the stipulation cannot revoke it if the third party has declared that he wished to take advantage of it." French Civil Code, § 1121. See also Civ. Code Cal. § 1559; Civ. Code S.Dak. § 1193; Rev. L. Okla. 1910, § 895.

² *Hill v. Hoeldtke*, *supra*.

³ *Trimble v. Strother*, (1874) 25 Ohio St. 378; *Berkshire Life Ins. Co. v. Hutchings*, (1884) 100 Ind. 496; *Commercial N.B. v. Kirkwood*, (1898) 172 Ill. 563; *Gilbert v. Sanderson*, (1881) 56 Iowa, 349.

⁴ *Tweeddale v. Tweeddale*, (1903) 116 Wis. 517; *Wetutsake v. Wetutsake*, (1914) 158 Wis. 305, 148 N.W. 1088. The right of the beneficiary of a life insurance policy is generally held to be irrevocable by the insured, even prior to any knowledge or assent by the beneficiary, unless the power of revocation is reserved in the policy. Such a power may of course be reserved.

⁵ *Arnold v. Nichols*, (1876) 64 N.Y. 117 (the usual rules as to rescission for fraud concerning the return of the consideration, etc., apply); *Jenness v. Simpson*, (1910) 84 Vt. 127, 139; *Cohrt v. Koch*, (1881) 56 Iowa, 658; *Crowe v. Lewin*, (1884) 95 N.Y. 423; *Dunning v. Leavitt*, (1881) 85 N.Y. 30; *Green v. Turner*, (1898) 80 Fed. 41, 86 Fed. 837.

⁶ *Supreme Council of the Royal Arcanum v. Behrend*, (1918, U.S.) 38 Sup. Ct. 608; *Jenness v. Simpson*, (1910) 84 Vt. 127, 143; *Osborne v. Cabell*, (1883) 77 Va. 462 (non-performance or failure of consideration). The case of *O'Rourke v. John Hancock M.L.I. Co.*, (1902) 23 R.I. 457, is in effect *contra*, and cannot be supported.

The power of rescission or alteration may be reserved in express terms.

himself. Thus a beneficiary can still hold a surety on his bond even though the promisee has discharged such surety's duty to himself by surrendering collateral securities¹ or by making an alteration of the contract with the principal and without the surety's consent.²

The duty of the promisor to the beneficiary is quite independent of previous or subsequent relations between the promisee and the beneficiary.³

299. Massachusetts law. Prior to 1850 the Supreme Court of Massachusetts held in a number of cases that a beneficiary could sue on a contract made by others.⁴ It was largely upon these cases that the decision in *Lawrence v. Fox*⁵ was based, and they have had an important influence upon the law in the United States to-day. In *Mellen v. Whipple*⁶ it was held that a mortgagee could not sue the grantee of the mortgagor although he had assumed the debt, and Judge Metcalf put all the earlier cases into three classes which he declared to be exceptions to the general rule that no action lies by one not a promisee. Two of these classes were, first, cases where the defendant had received assets which he ought to pay over and, second, cases where the beneficiary was related by blood to the promisee. In *Putnam v. Field*⁷ a liberal application was made of the assets exception. In *Exchange Bank v. Rice*⁸ a creditor-beneficiary was not allowed

¹ *Doll v. Crume*, (1894) 41 Neb. 655; *School District v. Livers*, (1899) 147 Mo. 580.

² *Equitable Sur. Co. v. McMillan*, (1913) 234 U.S. 449; *United States v. National Sur. Co.*, (1899) 92 Fed. 549; *Victoria Lumber Co. v. Wells*, (1916) 139 La. 500; *Cowles v. U.S. Fidelity, etc. Co.*, (1903) 32 Wash. 120; *Conn v. State*, (1890) 125 Ind. 514; *Steffes v. Lemke*, (1889) 40 Minn. 27.

³ The fraud of the plaintiff as against the promisee is not available as a defense to the promisor. *Hurst v. Knight*, (1914, Tex.) 164 S.W. 1072. The grantee of the mortgagor who has assumed the mortgage debt can set up no defenses against the mortgagee except a satisfaction. *Washer v. Independent M. & D. Co.*, (1904) 142 Cal. 702, 708; *Davis v. Davis*, (1912) 19 Cal. App. 797 (statute of limitations); *Daniels v. Johnson*, (1900) 129 Cal. 415 (same).

⁴ *Felton v. Dickinson*, (1813) 10 Mass. 287 (sole beneficiary and blood relation); *Arnold v. Lyman*, (1821) 17 Mass. 400; *Hall v. Marston*, (1822) 17 Mass. 575; *Fitch v. Chandler*, (1849) 4 Cush. 254; *Brewer v. Dyer*, (1851) 7 Cush. 337 ("the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation").

⁵ (1859) 20 N.Y. 268.

⁶ (1854) 1 Gray, 317. See also *Dow v. Clark*, (1856, Mass.) 7 Gray, 198.

⁷ (1870) 103 Mass. 556.

⁸ (1871) 107 Mass. 37. But see *Nash v. Commonwealth*, (1899) 174 Mass. 335, where the exceptions laid down in *Mellen v. Whipple* seem to be approved.

to sue, Judge Gray referring to the three classes of exceptions with no very marked approval. Somewhat later all of Judge Metcalf's classes of exceptions seem to have been disapproved, and the cases on which they were based have been declared to be overruled. In *Marston v. Bigelow*¹ it was held that a sole beneficiary who was the son of the promisee could not enforce the contract in either law or equity; and in *Borden v. Boardman*² the assets exception was disregarded and it was held that the beneficiary could not sue unless the parties had created a trust. Had the magic word "trust" been used, it is clear that the beneficiary's action in "contract" would have been sustained.

Thus the Massachusetts law is supposed to have been brought into harmony with that of England. There is some reason to believe, however, that the Massachusetts court is not wholly satisfied, and numerous decisions very materially limit the rule. In several cases the court has established the existence of "privity" by the liberal use of fiction. Thus where the defendant promised an expectant father to pay a sum of money to the yet unborn child in return for the father's giving the child a certain name it was held that the *child* could maintain suit on the contract.³ In some curious fashion the court was able to convince itself that the child was the promisee and also gave part of the consideration. The child was really a sole (and donee) beneficiary. In like manner an artificial privity in favor of a creditor-beneficiary was discovered by the court in a case where the licensee of a patent had agreed to pay a royalty and had later assigned his license to the defendant "subject to covenants." The licensor was given judgment against the assignee for the royalty due.⁴ Again, where an insurance policy was issued to a *mortgagor* but the loss was payable to the mortgagee "as its interest may appear," it was held that the mortgagee could sue on the

¹ (1889) 150 Mass. 45. But see *Dean v. American Legion of Honor*, (1892) 156 Mass. 435, 438; *Attorney Gen. v. American Legion of Honor*, (1910) 206 Mass. 158, 166.

² (1892) 157 Mass. 410. A right in the plaintiff in this sort of case has since been recognized as enforceable by a bill in equity. *Forbes v. Thorpe*, (1911) 209 Mass. 570. And in other cases a *trust* was held to be created by reason of a statute that bears no obvious indication of any such intent. See *Nash v. Commonwealth*, (1899) 174 Mass. 335; *George H. Sampson Co. v. Commonwealth*, (1909) 202 Mass. 326.

³ *Gardner v. Denison*, (1914) 217 Mass. 492; *Eaton v. Libbey*, (1896) 165 Mass. 218.

⁴ *Paper Stock D. Co. v. Boston D. Co.*, (1888) 147 Mass. 318. In this case the licensee had an express power to assign; but this is not the power of an agent, much less is it the power to effect a novation.

policy in its own name.¹ In a later case,² the question was raised whether the mortgagee here sued as a promisee or as an assignee; but so far as appears, the plaintiff was a creditor-beneficiary.³ Much earlier, the court had held that a mortgagee-beneficiary could sue the promisor if he held an assignment from the promisee.⁴

In a recent case the court has held that a creditor-beneficiary has an equitable claim against the promisor on the theory that the duty of the promisor to the promisee is an *asset* of the latter that is available to his creditor.⁵ In another case, where *A* promised *B* "as trustee" to pay a sum of money to *C* it was held that *B* could recover substantial damages and would hold them in trust for *C*. It is to be observed that the promise of *A* was not to pay the money to *B* in trust for *C* but was to pay the money directly to *C*.⁶

Another method of creating a right in a creditor-beneficiary is to describe the defendant's failure to perform his contract as a tort.⁷ This method would be used only in cases where the defendant's conduct falls naturally within the tort field, and very likely the other existing facts would be held to create a tort liability in the absence of any contract whatever.

The foregoing cases indicate that the Massachusetts court is

¹ *Palmer Sav. Bank v. Insurance Co.*, (1896) 166 Mass. 189. Even if the plaintiff was *in fact* the promisee, which seems unlikely, it gave no consideration; and in the English courts this fact would deprive the plaintiff of a right to sue. *Dunlop v. Selfridge*, [1915] A.C. 847. No doubt this Massachusetts decision was influenced by R.L. 1902, c. 118, § 58; but that statute does not purport to confer a right of action upon a third party beneficiary. To the same effect is *Union Inst. v. Phoenix Ins. Co.*, (1907) 196 Mass. 230, where the mortgagor is declared to be the mortgagee's agent.

² *Attleborough Bank v. Security Ins. Co.*, (1897) 168 Mass. 147, 149.

³ The Michigan courts regard the mortgagee as a mere third party beneficiary, and deny him a remedy. *Minnock v. Eureka Ins. Co.*, (1892) 90 Mich. 236; *Hartford F.I. Co. v. Davenport*, (1877) 37 Mich. 609.

⁴ *Reed v. Paul*, (1881) 131 Mass. 129.

⁵ *Forbes v. Thorpe*, (1911) 209 Mass. 570. See also *Clare v. Hatch*, (1902) 180 Mass. 194. Observe that the existence of this "asset" makes the promisor a debtor and not a trustee. The same is true where a devisee accepts a devise on condition of payment of a legacy to a third party. *Felch v. Taylor*, (1832) 13 Pick. 133; *Adams v. Adams*, (1867) 14 Allen, 65. See discussion of this "asset" theory *supra*.

⁶ *Grime v. Borden*, (1896) 166 Mass. 198. See further, § 285, *supra*, note 4.

⁷ *Phinney v. Boston El. Co.*, (1909) 201 Mass. 286. "The contract with the city, whereby the defendant undertook to relieve the city of the performance of its statutory duty, brought the defendant into a relation to those travellers which was the foundation of a legal obligation to provide for their safety."

quite willing to enforce a duty in the absence of privity in favor of certain kinds of beneficiaries. It may be admitted that this tendency is as yet illustrated only in decisions that are based upon a liberal use of fiction or upon specious distinctions. This is the traditional manner in which a conservative court abandons a previously asserted general rule.¹

300. **New York law.** The law in New York has already been sufficiently indicated in discussing the rules prevailing throughout the whole country, for the New York courts have had a decisive influence on those prevailing rules. In one respect, however, these courts have been following a course similar to that indicated in Massachusetts. In a number of cases it was laid down that the doctrine of *Lawrence v. Fox*² was to be restricted to cases exactly parallel thereto, thus allowing creditor-beneficiaries to sue and shutting out sole or donee-beneficiaries. The existence of the relation of debtor and creditor between the promisee and the third party was required, or at least the former must owe the latter some "legal or equitable duty" which will be discharged by the promisor's performance.³ The New York courts are rapidly destroying this very unsatisfactory limitation, but are doing it by greatly expanding the content of the term "legal or equitable duty." Thus, the general duty that a husband owes to his wife to care for and support her is sufficient to enable her to sue on a promise (made to the husband) to pay her \$50,000.⁴ An aunt owes a sufficient duty to her favorite niece when the latter has lived in the aunt's house free of charge and has loved her aunt.⁵ A resident of a municipality can sue on a contract made between it and the defendant for the benefit of the inhabitants even though the resident could not have sued the municipality in this particular case, inasmuch as the municipality owes some sort of duty to conserve the interests of the in-

¹ By statute the beneficiary of a life insurance policy can sue thereon in his own name. St. 1894, c. 225. See also *Dean v. American Legion of Honor*, (1892) 156 Mass. 435; *Attorney Gen. v. American Legion of Honor*, (1910) 206 Mass. 158 ("on a broad construction of the statutes").

² (1859) 20 N.Y. 268.

³ *Durnherr v. Rau*, (1892) 135 N.Y. 219; *Vrooman v. Turner*, (1877) 69 N.Y. 280; *Lorrillard v. Clyde*, (1890) 122 N.Y. 498. *Todd v. Weber*, (1884) 95 N.Y. 181 is directly *contra*.

⁴ *Buchanan v. Tilden*, (1899) 158 N.Y. 109; *Bouton v. Welch*, (1902) 170 N.Y. 554. See also *De Cicco v. Schweizer*, (1917, N.Y.) 117 N.E. 807. It may be observed that the payment by the promisor will not discharge the duty of the husband to support his wife.

⁵ *Seaver v. Ransom*, (1917, App. Div.) 168 N.Y. Supp. 454; *aff'd* Ct. App. Oct. 1, 1918.

habitants.¹ On the same principle, the duty that a labor union owes to its members who pay dues is sufficient to sustain an action by a member as beneficiary.²

301. **Statutory provisions.** Some states provide by statute that one for whose benefit a promise is made may maintain an action upon the promise.³ Third parties can everywhere maintain suit upon statutory official bonds that have been required by law for their protection.⁴ Likewise there are statutes providing that contractors engaged on public works shall give a bond to secure performance and also to protect material men and laborers, a suit by such third persons being expressly or impliedly authorized.⁵

Most states having the reformed procedure provide that all

¹ *Little v. Banks*, (1881) 85 N.Y. 258; *Pond v. New Rochelle W. Co.*, (1906) 183 N.Y. 330; *Smyth v. New York*, (1911) 203 N.Y. 106; *Rigney v. New York, etc. R. Co.*, (1916) 217 N.Y. 31; *Schnaier v. Bradley Cont. Co.*, (1918, N.Y. App. Div.) 169 N.Y. Supp. 88. See also *City of St. Louis v. Von Phul*, (1895) 133 Mo. 561.

² *Gulla v. Barton*, (1914, N.Y.) 164 App. Div. 293.

³ "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Cal. Civ. Code, § 1559; Idaho Civ. Code, § 2728; Mont. Civ. Code, § 2103; N.Dak. Rev. Codes, § 5285; S.Dak. Civ. Code, § 4688.

"If a covenant or promise be made for the sole benefit of a person with whom it is not made, such person may maintain in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." Va. Code, § 2415; W.Va. Code, ch. 71, § 2.

"If there be a valid consideration for the promise, it matters not from whom it is moved; the promisee may sustain his action, though a stranger to the consideration." Georgia Code, (1911) § 4249.

"Any person or persons for whose benefit any contract shall have been made or may hereafter be made, whether such contract be under seal or not, may maintain an action thereon in any court of law or equity and may use the same as matter of defense to any action brought or to be brought against such person or persons, notwithstanding the consideration of such contract did not move from such person or persons." New Jersey Law 1902, c. 251.

See also French Civil Code, § 1121. The Louisiana Code is similar to the French. See *New Orleans St. J. Ass'n v. Magnier*, (1861) 16 La. Ann. 338; *Gay v. Blanchard*, (1880) 32 La. Ann. 497.

England and Massachusetts have statutes enabling the beneficiary of an insurance policy to sue. Mass. St. 1894, c. 225. In Michigan and Connecticut there are similar statutes in favor of mortgagee-beneficiaries. Mich. Comp. Laws 1897, § 519; Conn. G.S. 1902, § 587.

⁴ Such bonds are distinguished in *Jefferson v. Asch*, (1893) 53 Minn. 446. *Coster v. Albany*, (1871) 43 N.Y. 399, 412 (*semble*).

⁵ See the Federal statutes, 30 St. at L. 906, c. 218; 33 St. at L. 811, c. 778. Mass. R.L. 1902, c. 6, § 77; Mass. St. 1909, c. 514, § 23. *Equitable Sur. Co. v. McMillan*, (1913) 234 U.S. 448. Many cases of this sort are cited in note, 49 L.R.A. (N.S.) 1175-1197.

actions shall be brought in the name of the real party in interest. It has been inferred that this provision "places the matter beyond all doubt, for the person for whose benefit the promise is made is certainly the real party in interest."¹ In fact, however, this statutory provision does not affect the problem. It was adopted merely for the purpose of creating a more direct and satisfactory procedure for the enforcement of rights already recognized as existing by either law or equity (or by some other system of courts). The question to be determined here is what is the legal operation of the facts of offer and acceptance between promisor and promisee with respect to a third party beneficiary. Do they create in such third party any legal or equitable right? Until we answer this question in the affirmative, it can hardly be said that the beneficiary is "the real party in interest" as that term is used in the procedural statute. And after we have answered it in the affirmative, the beneficiary does not need the aid of this statute to sue in his own name.

¹ Pomeroy, *Rem. and Rem. Rights*, § 139; *Stevens v. Flannagan*, (1891) 131 Ind. 122; *Ellis v. Harrison*, (1891) 104 Mo. 270.

CHAPTER X

Assignment in the Law of Contract

302. Problem stated. We have seen that a contract cannot affect any but the parties to it.¹ But the parties to it may under certain circumstances drop out and others take their places, and we have to ask how this can be brought about, first, by the voluntary act of the parties themselves, or one of them, secondly, by the operation of rules of law.

I. ASSIGNMENT BY ACT OF THE PARTIES

This part of the subject also falls into two divisions, the assignment of liabilities and the assignment of rights, and we will deal with them in that order.²

¹ The preceding chapter shows to how great an extent this statement is inapplicable in the United States. The problem there was, What is the operative effect of the acts of offer and acceptance with respect to third parties. Here the question is, What is the operative effect of *subsequent* acts with respect to third parties.

² The author has here taken a very necessary step toward the analysis of contract as a legal conception; however, he does not proceed far enough. He is aware that contract is a complex conception, but his analysis is far from complete. (See *ante* §§ 274a, 275, note; also "The Alienability of Choses in Action" by Professor Walter W. Cook, 29 *Harvard Law Review*, 816; 30 *id.* 449.) Accepting Professor Hohfeld's analysis of legal relations as expressed in the following pairs of correlatives: right, duty; privilege, no-right; power, liability; immunity, disability; we must proceed to determine what power one of the parties to a contract may have over *each* of these various legal relations, either with or without the other party's consent. If the change takes place with the other party's consent, it may be called a novation or a rescission, but it will not be called *assignment*.

An assignment is the lawful extinguishment, otherwise than by mutual consent, of one or more of the above-described legal relations, and the substitution of other similar ones between one of the contracting parties and a third party. It was our accepted legal theory for centuries that this could not be done; but in the very teeth of the theory it *was done*, in respect of some of the legal relations. This was accomplished first in the courts of equity; but the courts of common law, while continuing to do lip-service to their theory, also practically accomplished it — first, by means of the power of attorney, and later without it.

A study of the cases will make it appear that a party to a contract has the power of assignment only with respect to his beneficial relations and not his onerous ones. In many cases he may extinguish his own rights, privileges, powers, and immunities and create similar relations in favor of a third person; but he cannot extinguish his own duties, no-rights, liabilities, and disabilities — this being equivalent to saying that he cannot extinguish the *other* party's rights, privileges, powers, and immunities.

1. *Assignment of duties and liabilities*

303. **Duties and liabilities cannot be assigned.** A promisor cannot assign either his duties or his liabilities under a contract. Or conversely, a promisee cannot be compelled, by the promisor or by a third party, to accept performance of the contract from any but the promisor.¹

The rule seems to be based on sense and convenience. A man is not only entitled to know to whom he is to look for the satisfaction of his rights under a contract; but, to use the language of Lord Denman in *Humble v. Hunter*,^a "he has a right to the benefit he contemplates from the character, credit, and substance of the person with whom he contracts."

The case of *Robson & Sharpe v. Drummond*^b illustrates the rule. Sharpe let a carriage to Drummond at a yearly rent for five years, undertaking to paint it every year and keep it in repair. Robson was in fact the partner of Sharpe, but Drummond contracted with Sharpe alone. After three years Sharpe retired from business, and Drummond was informed that Robson was thenceforth answerable for the repair of the carriage, and would receive the payments. He refused to deal with Robson, and returned the carriage. It was held that he was entitled to do so.

"The defendant," said Lord Tenterden, "may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe. . . . The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone and not with any other person."²

^a (1848) 12 Q.B. 317.

^b (1831) 2 B. & A. 303.

¹ This sentence is literally correct, but it may be misleading. One cannot substitute another as the party on whom the contractual duty rests, but this contractual duty may be merely to cause a certain result and not to cause it with the promisor's own hands. In such cases, personal performance of the labor is not a condition precedent to the duty of performance by the other party. See *post*, § 311.

² The fact that he "contracted with Sharpe alone" is not the test. It may be doubted whether he contracted for the repair of the carriage by Sharpe's own hands. If he *did*, the case is certainly well decided, Sharpe's personal action being a condition precedent to the defendant's duty to pay. The decision may likewise be sustained on the ground that Sharpe's announcement was a *repudiation* of his own liability in the event of non-performance by Robson.

Where performance of a contract involves personal credit or skill, it cannot be delegated to a third person. *Arkansas Valley Smelting Co. v. Belden Mining Co.*, (1888) 127 U.S. 379; *Edison v. Babka*, (1896) 111 Mich.

304. **The limits of the rule.** There are certain limitations to this rule. A duty or liability may be assigned by consent of the party entitled; but this is in effect the rescission of one contract and the substitution of a new one in which the same acts are to be performed by different parties. This is called a "novation" and it can only take place by agreement between the parties: novation cannot be compulsory.^a

Or again, if *A* undertakes to do work for *X* which needs no special skill, and it does not appear that *A* has been selected with reference to any personal qualification, *X* cannot complain if *A* gets the work done by an equally competent person. But *A* does not cease to be liable if the work is ill done, nor can any one but *A* sue for payment;^b in other words, there has been no true assignment of the contract,² but a vicarious performance of it.

Again, where an interest in land is transferred, liabilities attaching to the enjoyment of the interest may pass with it. But this arises from the peculiar nature of obligations attached to land, and will be matter for separate discussion.

2. *Assignment of rights at common law*

305. **Assignee of benefits may sue in name of assignor.** At common law, apart from the customs of the law merchant, the benefit of a contract, or of rights of action arising from contract, cannot be assigned so as to enable the assignee to sue upon it in

^a *Kemp v. Baerelman*, [1906] 2 K.B. at p. 610.

^b *British Waggon Co. v. Lea*, (1880) 5 Q.B.D. 149.

235; *Schultz v. Johnson*, (1845, Ky.) 5 B. Mon. 497; *Hardy, &c. Co. v. South Bend Co.*, (1895) 129 Mo. 222.

An assignment of contract rights is not invalid even though it purports to provide for a substitution of the assignee in the matter of duty and liability as well as of right; the assignee may enforce the assigned right in case the conditions precedent thereto in the way of performance by the assignor have been fulfilled. *Amer. Lith. Co. v. Ziegler*, (1914) 216 Mass. 287.

¹ If the performance of the contract does not involve personal credit or skill and does not require *A*'s personal action, *A* may delegate to *B* the performance and assign to *B* the right to payment, remaining liable to *X* for the manner in which the obligation is performed. *Devlin v. Mayor*, (1875) 63 N.Y.; *Liberty Wall Paper Co. v. Stoner &c. Co.*, (1901) 59 N.Y. App. Div. 353, Aff'd 170 N.Y. 582; *La Rue v. Groezinger*, (1890) 84 Cal. 281. See also *Rochester Lantern Co. v. Stiles &c. Co.*, (1892) 135 N.Y. 209. And see 18 *Harvard Law Review*, 23.

² The term "assignment of the contract" should be avoided, because it leads one to suppose "contract" a simple conception and a single relation. It would be better to say here "there has been no assignment of either a duty or a liability." *A*'s duty has been literally and personally performed by causing the work to be done by another person, and he can assign his right to the agreed compensation.

his own name.^a The rule is sometimes expressed by the phrase "a *chose in action* is not assignable."^{b 1} The assignee must sue in the name of the assignor or his representatives; or rather, the common law so far takes cognizance of such equitable rights as are created by the assignment that the name of the assignor may be used as trustee of the benefits of the contract for the assignee.²

306. Substituted agreement: novation. Practically the only way in which rights under a contract can be transferred at common law is not by assignment at all but by means of a substituted agreement, or "novation."³

If *A* owes *M* £100, and *M* owes *X* £100, it may be agreed among all three that *A* shall pay *X* instead of *M*, who thus terminates his legal relations with either party. In such a case the consideration for *A*'s promise is the discharge by *M*; for *M*'s discharge of *A*, the extinguishment of his debt to *X*; for *X*'s promise, the substitution of *A*'s liability for that of *M*.^{c 3}

^a *Powles v. Innes*, (1843) 11 M. & W. 10.

^b The term *chose in action* has been in common use for a long time, but some doubts have been recently raised as to its precise meaning. (See *Law Quarterly Review* for 1893, 1894, 1895.)

A Divisional Court, however, has now given us the following definition: "'chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession." *Torkington v. Magee*, [1902] 2 K.B. p. 430. The phrase "rights of property" does not seem a very happy one, but it is quite clear that the court meant to include under the term *chose in action* rights under a contract and rights of action arising from breach of contract.

^c *Fairlie v. Denton*, (1828) 8 B. & C. 400.

¹ The term "*chose in action*" may once have meant the physical *thing* to be recovered; but it now means an aggregate of legal relations that include one or more rights *in personam*. It does not include patents or copyrights, for in these the rights are *in rem*.

² In earlier times the courts of common law did not grant to the holder of a *chose in action* any power of assignment. For several centuries, at least, the courts of equity have done this, however; and for more than a century the common law has been substantially identical with equity. See Professor Walter W. Cook, "The Alienability of Choses in Action," 29 *Harvard Law Review*, 816; 30 *id.* 449. The court of equity recognised this by ceasing to give any remedy at all to the assignee. *Cator v. Burkes*, (1785) 1 Brown's Ch. Cas. 434; *Booth v. Warner*, (1797) reported in *Coleman v. Wolcott*, (1809, Conn.) 4 Day, 6, 18. After notice to the debtor, the assignor has no further power to control the action brought by the assignee, to release, or to discharge the debtor by accord and satisfaction. *Carrington v. Harway*, (1676) 1 Keb. 803; *Welch v. Mandeville*, (1816, U.S.) 1 Wheat. 233; *Legh v. Legh*, (1799) 1 Bos. & P. 447; *Wardell v. Eden*, (1801, N.Y.) 2 Johns. Cas. 258; *Littlefield v. Storey*, (1808, N.Y.) 3 Johns. 425; *Hackett v. Martin*, (1831, Me.) 8 Greenl. 77; *Colbourn v. Rossiter*, (1818) 2 Conn. 503; *Hough v. Barton*, (1848) 20 Vt. 455; *Fay v. Guynon*, (1881) 131 Mass. 31. Statutes now allow the assignee to sue in his own name. See N.Y. Code Civ. Proc. §§ 449, 1909.

³ *Heaton v. Angier*, (1835) 7 N.H. 397; *Clark v. Billings*, (1877) 59 Ind. 508; *Murphy v. Hanrahan*, (1880) 50 Wis. 485. See 6 *Harvard Law Review*, 184. It must not be supposed that this is the only possible form of novation.

307. **Consideration for promise to pay third party.** But there must be ascertained sums due from *A* to *M* and from *M* to *X*; and there must also be a definite agreement between the parties, for it is the promise of each which is the consideration for the promises given by the others.¹

A promise by a debtor to pay a third party, even though afterwards it be assented to by the creditor, will not enable the third party to sue for the sum promised.^{a 2}

Again, a written authority from the creditor to the debtor to pay the amount of the debt over to a third party, even though the debtor acknowledge in writing the authority given, will not entitle the third party to sue for the amount.^b

"There are two legal principles," said Martin, B., "which, so far as I know, have never been departed from: one is that, at common law, a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and that being the law, it is perfectly clear that *M* could not assign to the plaintiff the debt due from the defendant to him. . . . The other principle which would be infringed by allowing this action to be maintained is the rule of law that a bare promise cannot be the foundation of an action. . . . No doubt a debtor may, if he thinks fit, promise to pay his debt to a person other than his creditor; and if there is any consideration for the promise, he is bound to perform it. But here there was none whatever. There was no agreement to give time, or *that the debt of M should be extinguished*, — no indulgence to him or detriment to the plaintiff. There was nothing in the nature of a consideration moving from the plaintiff to the defendant, but a mere promise by the defendant to pay another man's debt."^c

308. **Summary.** It is thus apparent that a contract, or right of action arising from contract, cannot be assigned at common

^a *Cuxon v. Chadley*, (1824) 3 B. & C. 591.

^b *Liversidge v. Broadbent*, (1859) 4 H. & N. 603.

^c Per Martin, B., *Liversidge v. Broadbent*, (1859) 4 H. & N. 610.

¹ There must indeed be some consideration for the debtor's promise to pay a new creditor, but this consideration need not consist in a *promise*, and the consideration may be sufficient even though there is no "ascertained sum" due.

See *Warren v. Batchelder*, (1844) 15 N.H. 129; *Smart v. Tetherly*, (1876) 58 N.H. 310.

² *McKinney v. Alvis*, (1852) 14 Ill. 33. But see *Small v. Schaefer*, (1865) 24 Md. 143; *Compton v. Jones*, (1825, N.Y.) 4 Cow. 13. Cf. *Jessel v. Williamsburgh Ins. Co.*, (1842, N.Y.) 3 Hill, 88.

Such a promise, without any new consideration, does not operate as a new contract; but it might reasonably be held to supply the element of privity and enable the assignee to sue in his own name for that to which he was already legally entitled and for which he could already sue in the name of the assignor.

law except (1) by an agreement between the original parties to it and the intended assignee, which is subject to all the rules for the formation of a valid contract, and which is limited in its operation to the transfer of a debt;¹ or (2) by the rules of the law merchant under circumstances to be noted presently.

3. Assignment of rights in equity

309. Equity allows assignment of rights. Equity would permit the assignment of contractual rights, including debts, whether such rights were legal or equitable. If they were legal rights — rights, that is, which were enforceable in a common-law court — equity would assist the assignee to get rid of the difficulties presented by the common-law rules as to assignment, by compelling the assignor to allow the use of his name in a common-law action;² if the rights were equitable rights — enforceable, that is, only in a court of equity — equity laid down its own rules of procedure and allowed the assignee to sue in his own name.^a

310. Some choses in action not assignable. But it would seem that the rights thus assignable do not cover all rights *ex contractu* which might be included within the term *chose in action*.

In the first place, by reason of the rules as to champerty and maintenance,³ a mere right to sue for damages in respect of the breach of a contract cannot be assigned.^b

It is well settled that as a general rule the benefit of a contract is assignable in equity, and may be enforced by the assignee, yet a court of equity is as much bound as a court of common law by the law relating to champerty and maintenance, and if an assignment of a *chose in action* is obnoxious to that law it is bad in equity no less than in law. An assignment of a mere right of litigation is bad; but an assignment

^a *Hammond v. Messenger*, (1838) 9 Sim. 327.

^b *May v. Lane*, (1894) 64 L.J. (Q.B.) (C.A.) 236. In *King v. Victoria Insurance Co.*, [1896] A.C. 250, the Judicial Committee of the Privy Council decided in favor of the assignability of a right of action in tort, but English courts are not bound by this decision.

¹ This limitation seems unsound. In addition, novation should be regarded as distinct from assignment, and not as an exception to the law of assignment.

² An assignment cannot be enforced in equity if the assignee can proceed at law in the name of his assignor, unless the legal remedy would be incomplete or inadequate. *Carter v. United Ins. Co.*, (1815, N.Y.) 1 Johns. Ch. 463; *Walker v. Brooks*, (1878) 125 Mass. 241; *New York &c. Co. v. Memphis Water Co.*, (1882) 107 U.S. 205. The two cases in which the assignment is most commonly enforced in equity are, first, the assignment of future interests, and, second, the assignment of part of a demand. *Field v. Mayor* (1852) 6 N.Y. 179; *James v. Newton*, (1886) 142 Mass. 366.

³ See § 252, *ante*.

of property is valid, even though that property may be incapable of being recovered without litigation.^{a 1}

311. An assigned right may be subject to conditions. Again, where under a contract there are mutual obligations still to be enforced and it is not possible to say that the whole consideration has been executed, the contract "cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi-privity with a substituted person."²

"To suits on these contracts, therefore, the original contractee must be a party. . . . This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable. What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of the obligation on to a substituted contractor any more than where it is special and personal, but that in the first case the contractor may rely upon the act of another as performance by himself, whereas in the second case he cannot."³

In such cases, what appears at first sight to be an assignment of a contract by the original contracting party is really the procuring by him of a vicarious performance of it through some one else; but the word "assignment" is commonly used by judges to express the legal effect of the transaction between the parties.^c The original contracting party still remains liable on his contract and must as a rule be made a party to any action on the contract;^d though it seems that such joinder will be dispensed with where he is become a "mere name" — e.g., a company in process of liquidation — and rights against him would be illu-

^a *Dawson v. G.N. & City Ry.*, [1905] 1 K.B. (C.A.) 270.

It seems, however, that a claim on a marine insurance policy (which is in fact a claim for damages against the underwriter for breach of his contract to pay under the policy), may in some circumstances, after a loss insured against has occurred, be assigned even to a person not possessing an insurable interest in the thing insured. This appears to be a genuine exception to the general rule. It is not affected by the Marine Insurance Act. *Lloyd v. Fleming*, (1872) L.R. 7 Q.B., 299, 303.

^b *Tolhurst's Case*, [1902] 2 K.B. 660, 669.

^c *British Wagon Co. v. Lea*, (1880) 5 Q.B.D. 149.

^d *Griffith v. Tower Publishing Co.*, [1897] 1 Ch. 21.

¹ In the United States generally all rights of action are assignable except those arising from a tort to the person or from a breach of promise to marry. See *Brantly, Pers. Prop.* §§ 265-271; *N.Y. Code Civ. Proc.* § 1910; *Butler v. New York & E.R.R. Co.*, (1856, N.Y.) 22 Barb. 110.

² This use of the term "privity" is objectionable. Whatever "privity" may be, it is not required in the case of assignment, as is indicated by the use of the equally objectionable term "quasi-privity." All that is meant here is that personal performance by one party may be a condition precedent to the existence of any enforceable claim against the other, and an assignee of the claim will take subject to this condition. See *ante*, § 303.

sory and worthless.^{a 1} Such special circumstances however in no way affect the principles involved.

On the other hand, where the consideration for a contract has been executed, or where — although mutual obligations still subsist — no special qualifications are involved, there the benefit of the contract may be assigned. Thus, if *A* agrees to sell real property to *X* and *X* assigns his rights under the contract to *M*, the latter may sue *A* in his own name not only for specific performance but even for unliquidated damages.^{b 2} Again, debts which will presently become due to an individual or firm in the course of business may be assigned, but not a right arising under a promise to lend money where no fund is specified from which the loan is to be made.^c

312. Conditions affecting assignment. But certain matters affecting the rights of the assignee must be noticed.

(a) As between assignor and assignee an agreement to assign a *chose in action* requires, like other contracts, consideration to support it;^d but in any event a debtor who is directed by his creditor to pay the debt to a third party obtains a good discharge by doing so and is not concerned with the question

^a Tolhurst's Case, [1903] A.C. 414, 420.

^b Torkington v. Magee, [1902] 2 K.B. 427.

^c Talby v. Official Receiver, (1888) 13 App. Cas. 533; Western Waggon Co. v. West, [1892] 1 Ch. 271.*

^d See *Law Quarterly Review*, vol. xvii, p. 90.

* This case is sustainable on other grounds; but there seems to be no reason why a right to receive money as a loan should not be assignable, subject of course to all express and constructive conditions.

¹ In Tolhurst's Case, *supra*, there was a contract for the delivery of 750 tons of chalk per week and of as much more as the Imperial Company (the buyer) might need in a certain factory. The price was to be paid monthly. Later the Imperial Company sold out to a new company and went into liquidation and was dissolved. The House of Lords held that Tolhurst must supply the chalk to the assignee. The soundness of this decision is very doubtful. The buyer's right to have chalk delivered may, indeed, be assigned; but in this case the Imperial Company had disabled itself to perform the duty of paying the agreed price, and the court's decision compels the seller to give credit to the assignee alone. The deliveries were in part to precede payment; and furthermore, it should be held to be a constructive condition of the seller's duty to deliver that the buyer should have the continued ability to pay. Cf. *Arkansas Valley Smelting Co. v. Belden Mining Co.*, (1888) 127 U.S. 379.

² *Gustin v. Union School Dist.*, (1893) 94 Mich. 502; *Francisco v. Smith*, (1894) 143 N.Y. 488. In cases like *Torkington v. Magee*, *supra*, the seller is not forced to give credit to a different buyer. Tender of the price is a condition precedent, but it can be fulfilled equally well by the assignee as by the assignor. If the assignee does not pay the price, the assignor remains bound to pay it and in these cases has not disabled himself from paying it.

whether or no the third party has given consideration for the assignment.^{a 1}

(b) The assignment will not bind the debtor until he has received notice, although it is effectual as between assignor and assignee from the moment of the assignment.^b

(c) The assignee takes "subject to equities"; that is subject to all such defenses as might have prevailed against the assignor. In other words, the assignor cannot give a better title than he has got.

These last two propositions require some illustration.

313. **Notice to debtor.** It is fair upon the person liable that he should know to whom his liability is due. So if he receive no notice that it is due to another than the party with whom he originally contracted, he is entitled to the benefit of any payment which he may make to his original creditor.² A convenient illustration is furnished in the case of covenants to pay interest on a mortgage debt. If the mortgage be assigned by the mortgagee without notice to the mortgagor, and interest be afterwards paid by the mortgagor to the duly-authorized agent of the mortgagee, the money so paid, though due to the assignee, cannot be recovered by him from the debtor.^c

The *rationale* of the rule is thus expounded by Turner, L.J., in *Stocks v. Dobson*:^d

"The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a court of equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assign-

^a *Brandts v. Dunlop*, [1906] A.C. 454, 462.

^b *Re Patrich*, [1891] 1 Ch. 82.

^c *Williams v. Sorrell*, (1799) 4 Vesey, 389.

^d (1853) 4 D.M. & G. 15.

¹ The debtor cannot defend on the ground that the assignment was without consideration. *Coe v. Hinkley*, (1896) 109 Mich. 608; *Duryea v. Harvey*, (1903) 183 Mass. 429; *Phipps v. Bacon*, (1903) 183 Mass. 5; *Cronin v. Chelsea Bank*, (1909) 201 Mass. 146; *MacKeown v. Lacey*, (1909) 200 Mass. 437; *Richardson v. Mead*, (1858) 27 Barb. 178; *Allen v. Brown*, (1870) 44 N.Y. 228, affirming 51 Barb. 86; *Buxton v. Barrett*, (1882) 14 R.I. 40; *Welch v. Mayer*, (1894) 4 Colo. App. 440; *Moore v. Waddle*, (1868) 34 Cal. 145; *Morrison v. Ross*, (1887) 113 Ind. 186; *Pugh v. Miller*, (1890) 126 Ind. 189; *Wardner v. Jack*, (1891) 82 Iowa, 435; *Walker v. Bradford Old Bank*, (1884) 12 Q.B.D. 511. Want of consideration may affect the rights of the assignee as against the assignor's creditors, or a subsequent assignee for value. Of course an assignment without consideration is unenforceable, if it is regarded as an executory contract, as between assignor and assignee.

² *Heermans v. Ellsworth*, (1876) 64 N.Y. 159.

ment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the court has therefore required notice to be given to the debtor of the assignment *in order to perfect the title of the assignee.*"

And the same case is authority for this further proposition, that "equitable titles have priority according to the priority of notice." The successive assignees of an obligation rank as to their title, not according to the dates at which the creditor assigned his rights to them respectively, but according to the dates at which they gave notice to the party to be charged.^{a 1}

^a314. Assignee takes subject to equities. "The general rule, both at law and in equity, is that no person can acquire title to a *chose in action* or any other property, from one who has himself no title to it."^b

And further, "if a man takes an assignment of a *chose in action*, he must take his chance as to the exact position in which the party giving it stands."^c

The facts of the case last cited are somewhat complex, and the rule is so clear that a complicated illustration would not tend to make it clearer. It is enough that the assignee of contractual

^a Marchant v. Morton, Down & Co., [1901] 2 K.B. 829.

^b Crouch v. Credit Foncier, (1873) L.R. 8 Q.B. 380.

^c Mangles v. Dixon, (1852) 3 H.L.C. 735.

¹ The rule stated by the author is approved in *Vanbuskirk v. Hartford Fire Ins. Co.*, (1841) 14 Conn. 141; *Clodfelter v. Cox*, (1853, Tenn.) 1 Sneed, 330; *Fraleys Appeal*, (1874) 76 Pa. 42; *Murdock v. Finney*, (1855) 21 Mo. 138; *Ward v. Morrison*, (1853) 25 Vt. 593. But the rule that the one prior in time will be protected is sustained by *Muir v. Schenck*, (1842, N.Y.) 3 Hill, 228; *Williams v. Ingersoll*, (1882) 89 N.Y. 508; *Thayer v. Daniels*, (1873) 113 Mass. 129; *Burton v. Gage*, (1902) 85 Minn. 355; *Sutherland v. Reeve*, (1894) 151 Ill. 384; *Emley v. Perrine*, (1896) 58 N.J. L. 472; *Summers v. Hutson*, (1874) 48 Ind. 228.

"Whatever view may be entertained as to the English doctrine which prefers the assignee who first gives notice, the second assignee is in several contingencies clearly entitled to supplant the first assignee (who has given no notice); e.g., (1) if acting in good faith he obtains payment of the claim assigned, *Judson v. Corcoran*, (1854, U.S.) 17 How. 612; *Bridge v. Conn. Ins. Co.*, (1890) 152 Mass. 343, or (2) if he reduces his claim to a judgment in his own name, *Judson v. Corcoran*, or (3) if he effects a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself; *New York Co. v. Schuyler*, (1865) 34 N.Y. 30, 80, or (4) if he obtains the document containing the obligation when the latter is in the form of a specialty; *Re Gillespie*, (1883) 15 Fed. 734; *Bridge v. Conn. Ins. Co. supra*. In all these cases, having obtained a legal right in good faith and for value, the prior assignee cannot properly deprive him of his legal right." Ames, *Cases Trusts* (2d ed.) 328. Case (4), above, should be regarded as based upon the negligence of the first assignee as well as upon any mere technical legal right in the second. See also *Herman v. Conn. Mut. L.I. Co.*, (1914) 218 Mass. 181.

rights must take care to ascertain the exact nature and extent of those rights; for he cannot take more than his assignor has to give, or be exempt from the effect of transactions by which his assignor may have lessened or invalidated the rights assigned.

In like manner, if one of two parties be induced to enter into a contract by fraud, and the fraudulent party assign his interest in the contract for value to *X*, who is wholly innocent in the matter, the defrauded party may get the contract set aside in equity in spite of its assignment to an innocent party.^{a 1}

"Where there is a claim arising out of the contract itself under which the debt arises, and the claim affects the value or amount of that which one of the parties to that contract has purported to assign for value, then, if the assignee subsequently sues, the other party to the contract may set up that claim by way of defence as cancelling or diminishing the amount of that to which the assignee asserts his right under the assignment."^b

But the debtor cannot set up against an innocent assignee a claim of a strictly personal nature that he may have against the assignor — for example, a claim for damages for fraud for having been induced to enter into the contract. He is restricted to claims which arise out of the contract itself and do not exist independently of it.²

4. Assignment under statutory provisions

315. **English statutes.** It remains to consider, so far as mere assignment goes, the statutory exceptions to the common law rule that a *chose in action* is not assignable.³

^a *Graham v. Johnson*, (1869) 8 Eq. 36.

^b *Stoddart v. Union Trust*, [1912] 1 K.B. 181, 193.

¹ An assignee takes subject to whatever defenses exist in favor of the debtor against the assignor at the time of the assignment or until notice of it is given to the debtor. *Warner v. Whittaker*, (1858) 6 Mich. 133; *Lane v. Smith*, (1883) 103 Pa. 415; *Parmly v. Buckley*, (1882) 103 Ill. 115. And in some states he takes subject to whatever equities exist in favor of third persons against the assignor. *Owen v. Evans*, (1892) 134 N.Y. 514; *Kernohan v. Durham*, (1891) 48 Ohio St. 1.

The assignee's rights, like the assignor's, are subject to the fulfillment of all conditions precedent express or constructive. If such a condition has failed of fulfillment, the assignor and debtor may properly rescind their contract and substitute a new one as to which the assignee has no rights. *Homer v. Shaw*, (1912) 212 Mass. 113.

² In *Gilfeather v. Cohen*, (1912) 211 Mass. 119, the debtor had expressly authorized the assignment for certain purposes, and it was held that his equities were shut out.

³ In many states all *chooses in action* arising from contract are rendered assignable so as to vest the legal title in the assignee. *Stimson*, Am. St. Law,

(a) The Judicature Act of 1873, § 25 (6), gives to the assignee of any debt or *legal* chose in action all legal rights and legal and other remedies. But (1) the assignee takes subject to equities; (2) the assignment must be absolute and not by way of charge; (3) must be in writing signed by the assignor; (4) express notice in writing must be given to the party to be charged, and the title of the assignee dates from notice.

The sub-section does not touch the rules of assignment in equity or the rights thereby created. "The sub-section is merely machinery; it enables an action to be brought by the assignee in his own name in cases where previously he would have sued in the name of the assignor, but only where he could so sue." ^a The debt assigned accordingly becomes the debt of the assignee for all purposes; and if the debtor brings an action against the assignee on another claim, the assignee can set off the assigned debt against such a claim. ^b

But the statutory remedy is still of narrower application than the equitable.

In the first place, it only applies to *legal* choses in action, that is, choses in action which were enforceable in a court of common law; it does not apply to choses in action which were only enforceable in a court of equity. Secondly, the Act requires the assignment to be "absolute" and not "by way of charge." This means that it must not be subject to any condition, and that it must be an assignment of a sum due (and, it seems, of the whole of that sum ^c) or about to become due, not of an amount to be determined by some deficiency in accounts between assignor and assignee. The original debtor is not to find his liability to be dependent "on any question as to the state of accounts" between assignor and assignee. ^d

^a *Per* Channell, J., *Torkington v. Magee*, [1902] 2 K.B. at pp. 430 & 435.

^b *Bennett v. White*, [1910] 1 K.B. 643.

^c The better opinion appears to be that a portion of an existing debt cannot be *legally* assigned: see *Forster v. Baker*, [1910] 1 K.B. 636, where it was so decided by Bray, J. On appeal, the Court of Appeal did not dissent from this view, but merely held that the assignee of part of a judgment debt could not issue execution on it, inasmuch as the judgment creditor himself could not have done so. In *Skipper v. Holloway*, [1910] 1 K.B. 630, *Darling, J.*, had, however, decided in favor of such an assignment; the decision was afterwards reversed, but on other grounds.

^d *Durham v. Robertson*, [1898] 1 Q.B. 773.

§ 4031. In states having the reformed procedure an assignee must sue in his own name. *Ib.*, § 4032. But he takes subject to equities. *Ib.* The requirement that the assignment and notice must be in writing does not generally prevail in this country. See generally 4 Cyc. 96-98, and see *Allen v. Brown*, (1870) 44 N.Y. 228; *Walker v. Mauro*, (1853) 18 Mo. 564; *Bryne v. Dorey*, (1915) 221 Mass. 399.

A owes £50 to X due in a month, and X owes £50 to M due in three weeks. If X assigns to M the debt of A conditionally on his not having paid his debt to M when due, or if he assigns so much of the debt of A as will make good any deficiency in his payment to M, this will disentitle M to the legal remedies conferred by the Act. It would thus appear that there may be a good equitable assignment of a legal *chose in action* which, nevertheless, would not give the assignee the benefit of the machinery of the Judicature Act.

The requirements of the Act as to form are more stringent than in the case of an equitable assignment, since writing is required both for assignment and notice. But it must not be forgotten that the method of assignment which the Act provides is in addition to, and not in substitution for, methods already in existence. An assignment which does not comply with one or more of the requirements of the Act may still be a perfectly good and valid equitable assignment and enforceable accordingly. Omission to take advantage of the machinery provided by the Act may mean, for example, that the assignor must still be made a party to the action.^a The Act, in other words, only affords a simplified method of assignment for those who choose to avail themselves of it.

The Judicature Act says nothing as to consideration, but since it only affects procedure, even if consideration were necessary as between assignee and assignor, the debtor is not concerned with the dealings of the assignee with the assignor, and could not on his own account set up as a defense when sued by the assignee, that as between them the transaction was a voluntary one.^b

An assignment duly made, whether by the rules of equity or by those of the Judicature Act, operates without the consent of the party liable. In *Brice v. Bannister*^c (a case of equitable assignment) the defendant received express notice of the assignment of a debt accruing from him to the assignor. He refused to be bound by the assignment and paid his debt to the assignor. He was held liable notwithstanding to the assignees for the amount assigned.^d

(b) By the Policies of Insurance Act, 1867,^e policies of life insurance are assignable in a form specified by the Act, so that the

^a *Brandts v. Dunlop*, [1905] A.C. pp. 461, 462.

^b *Walker v. Bradford Old Bank*, (1884) 12 Q.B.D. 511.

^c (1878) 3 Q.B.D. 569.

^d *Swan v. Maritime Insee. Co.*, [1907] 1 K.B. 116.

^e 30 & 31 Vict. c. 144, §§ 1, 2.

assignee may sue in his own name. Notice must be given by the assignee to the insurance company, and he takes subject to such defenses as would have been valid against his assignor.

(c) By the Marine Insurance Act, 1906,^a policies of marine insurance are similarly assignable; but this statute contains no requirement as to notice.

(d) Shares in companies are assignable under the provisions of the Companies Clauses Act, 1845,^b and the Companies (Consolidation) Act, 1908.^c

(e) Mortgage debentures issued by companies under the Mortgage Debenture Act, 1865, are assignable in a form specified by the Act.^d

5 *Negotiability*

316. **Assignability and negotiability.** So far we have dealt with the assignment of contracts by the rules of common law, equity, and statute, and it would appear that under the most favorable circumstances the assignment of a contract binds the party chargeable to the assignee, only when notice is given to him, and subject always to the rule that a man cannot give a better title than he possesses in himself.

We now come to deal with a class of promises the benefit of which is assignable in such a way that the promise may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defenses which would have been good against the assignor of the promise. In other words, we come to consider that special class of assignable contracts known as *negotiable instruments*.

317. **Characteristics of negotiability.** The essential features of a negotiable instrument appear to be these:

Firstly, the title to it passes by delivery.

Secondly, the written promise which it contains gives a right of action to the holder of the document for the time being, though he and his holding may be alike unknown to the promisor.

Thirdly, the holder for the time being (if he is a *bona fide* holder for value) is not prejudiced by defects in the title of his assignor; he does not hold "subject to equities."

Notice therefore need not be given to the party liable, and the assignor's title is immaterial.

^a 6 Edw. VII, c. 41, § 50.
^c 8 Edw. VII, c. 69, § 22.

^b 8 & 9 Vict. c. 69, § 14.
^d 28 & 29 Vict. c. 78.

318. What contracts negotiable. Certain contracts are negotiable by the custom of merchants recognized by the courts; such are foreign and colonial bonds expressed to be transferable by delivery, and scrip certificates which entitle the bearer to become a holder of such bonds or of shares in a company, and, perhaps we may say, other instruments to which the character of negotiability may from time to time be attached by the custom of merchants proved to the satisfaction of the courts.^a

Bills of exchange were negotiable by the law merchant; promissory notes by 3 & 4 Anne, c. 9;¹ both classes of instruments are now governed by the Bills of Exchange Act, 1882.^{b 2} A check is a bill of exchange drawn on a banker, but possesses certain features of its own which are not common to all bills of exchange. A Bank of England note is a promissory note which by statute is made legal tender, except by the Bank itself.^c

Bills of lading, which are affected both by the law merchant and by statute,^d possess some characteristics which will call for a separate consideration.

319. Bills of exchange. Bills of exchange and promissory notes figure so constantly in the law of contract, and are so aptly illustrative of the nature of negotiability, that we will shortly consider their principal features.

Definition. A bill of exchange is an unconditional written order addressed by *M* to *X* directing *X* to pay a sum of money to a specified person or to bearer.^{e 2} Usually this specified person is a third person *A*, but *M* may draw a bill upon *X* in favor of himself. We must assume that the order is addressed to *X* either because he has in his control funds belonging to *M* or is prepared to give *M* credit; and since we are here dealing with bills of exchange merely as illustrative of negotiability, we will adopt the most usual, as it is the most convenient form for illustration.

How drawn. *M* directs *X* to pay a sum of money to "*A* or order," or "*to A* or bearer." *M* is then called the drawer of the bill, and by drawing it he promises to pay the sum specified

^a *Rumball v. Metropolitan Bank*, (1877) 2 Q.B.D. 194.

^b 45 & 46 Vict. c. 61.

^c 3 & 4 Will. IV, c. 98.

^d 18 & 19 Vict. c. 111.

^e 45 & 46 Vict. c. 61, § 3 (1).

¹ 3 & 4 Anne, c. 9, has been re-enacted in substance in most American states. *Stimson*, Am. St. Law, § 4701. Where not formally re-enacted it is in force as a part of our common law. 3 Kent, Comm. 72.

² A uniform Negotiable Instruments Law is now in force in upwards of thirty American jurisdictions.

³ *Neg. Inst. Law*, § 126 (N.Y. § 210).

either to *A* or to any subsequent holder into whose hands it may come if *X* do not accept the bill or, having accepted it, fail to pay.¹

How accepted. *X*, upon whom the bill has been drawn, is called the drawee; but when he has assented to pay the sum specified, he is said to become the "acceptor." Such assent (or "acceptance") must be expressed by writing on the bill signed by the acceptor, or by his simple signature.

The drawer of the bill may transfer it to another person before it has been "accepted"; and in that case it is the business of the transferee to present it to the drawee for acceptance. He is entitled to demand an unconditional acceptance; but he may (if he pleases) take one qualified by conditions as to amount, time, or place,^a but this releases the drawer or any previous indorser from liability unless they assent to the qualification.^{b 2}

How transferred. If the bill be payable to *A* or bearer, it may be transferred from one holder to another by mere delivery: if it is payable to *A* or order, it must be first indorsed. Until it is indorsed, it is not a complete negotiable instrument.

If the indorsement consists in the mere signature of *A*, the bill is said to be indorsed "in blank." It then becomes a bill payable to bearer, that is, assignable by mere delivery; for *A* has given his order, though it is an order addressed to no one in particular. The bill is in fact indorsed over to any one who becomes possessed of it.

If the indorsement takes the form of an order in favor of *D*, written on the bill and signed by *A*, it is called a "special" indorsement. Its effect is to assign to *D* the right to demand acceptance from the drawee, if the bill has not already been accepted; or payment, if the drawee has already accepted and the bill has fallen due. In the event of default in acceptance or payment, *D* has a twofold remedy. He may demand the sum specified in the bill either from the original drawer, or from *A* the indorser; for *A* is to all intents a new drawer of the bill. Every indorser therefore becomes an additional security for payment to the holder for the time being.

^a Note, however, that by § 19 (2) (c) of the Bills of Exchange Act, a condition as to place is not to be regarded as qualifying an acceptance, "unless it expressly states that the bill is to be paid there only and not elsewhere." Hence the common form "accepted payable at the X. Bank" is not a qualified acceptance.

^b Bills of Exchange Act, §§ 19, 44.

¹ And if due notice of the dishonor be given him, and in the case of a foreign bill due protest be had. See Neg. Inst. Law, § 61, (N.Y. § 111).

² Neg. Inst. Law, §§ 132-42 (N.Y. §§ 220-30).

320. **Promissory notes.** A promissory note is a promise in writing made by *X* to *A* that he will pay a certain sum, at a specified time, or on demand, to *A* or order, or to *A* or bearer.^a *X*, the maker of the note, is in a similar position to that of an acceptor of a bill of exchange; and the rules as to assignment by delivery or indorsement are like those relating to a bill of exchange.^{b 1}

321. **Assignability distinguished from negotiability.** We may now endeavor to distinguish, by illustration from the case of instruments of this nature, the difference between *assignability* and *negotiability*.

Let us suppose that *A* draws a bill on *X* payable to himself or order and, having procured *X*'s acceptance, indorses the bill over to *D*. When the time for payment falls due, *D* presents the bill for payment to *X*, the acceptor, and sues him upon default.

In the case of negotiable instruments consideration is presumed to have been given until the contrary is shown, and notice of assignment (as would be required in the case of an ordinary chose in action) is not necessary. *D* will therefore have to do no more than prove that the signature of acceptance on the bill is *X*'s signature, everything else being presumed in his favor.²

Suppose, however, it turn out that the bill was accepted by *X* on account of a gambling debt owed by him to *A*, or was obtained from him by fraud. The position of *D* is then modified to this extent.

As between *A* and *X* the bill would be void or voidable according to the nature of the transaction, but this does not necessarily affect the rights of *D*, the subsequent holder.³

Every holder of a bill of exchange is *prima facie* deemed to be a holder in due course — that is, he is deemed to have given value for it in good faith. But if in an action on the bill, evidence is given that the acceptance, issue, or subsequent negotiation of the bill is tainted with fraud or illegality of some kind, then this presumption no longer holds good; the burden of proof is

^a See form in Appendix D.

^b An I.O.U., which at first sight would seem to bear some resemblance to a promissory note, is not of course a legal instrument of any kind; it is only evidence of an "account stated."

¹ Neg. Inst. Law, §§ 60, 184 (N.Y. §§ 110, 320).

² Neg. Inst. Law, §§ 24, 59 (N.Y. §§ 50, 98).

³ A *bona fide* holder for value is not subject to personal defenses. Clark v. Pease, (1860) 41 N.H. 414. But he is subject to absolute defenses which go to destroy the paper. New v. Walker, (1886) 108 Ind. 365; Walker v. Ebert, (1871) 29 Wis. 194.

shifted, and *D*, the holder of the bill, must prove affirmatively that he has in fact given value for it and moreover given value in good faith — without, that is, any knowledge of the prior fraud or illegality.^a If he can do so, he will win his action, whatever the earlier history of the bill may be.¹ It is to be observed, however, that the burden of proving that value has been given in good faith only rests on the plaintiff, if he is a remote party to the bill, that is, if he holds as indorsee or donee.^b If he is an immediate party, that is, if he is the original payee, the burden of proof does not shift, and it rests with the defendant to show that the holding is not *bona fide*.

And the effect of an illegal consideration for an indorsement should also be noticed. The indorsee cannot sue the indorser on the illegal contract made between them; but he can sue the acceptor, and probably a previous indorser who before the illegality had given value for the bill.^c

A broker pledged his client's bonds, which were negotiable by the custom of merchants, with a bank, to secure advances made to himself. The bank had no notice that the bonds were not his own, or that he had no authority to pledge them: he became insolvent; the bank sold the bonds in satisfaction of the debt due, and the broker's client sued the bank. The House of Lords held that he could not recover; for (1) the bonds were negotiable, and (2) being so negotiable —

"It is of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary: and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title or the extent of his authority."^d

322. Effect of seal on negotiability. The case of *Crouch v. Credit Foncier of England*^e illustrates not only the nature of negotiability, but the limits within which the creation of negotiable instruments is permissible.

A debenture assignable under the Companies Act and expressed to be payable to the bearer was stolen; the thief sold it to the plaintiff, and he sued the company for non-payment; the

^a *Tatam v. Halear*, (1889) 23 Q.B.D. 345. ^b *Talbot v. Van Boria*, [1911] 1 K.B. 854.

^c *Flower v. Sadler*, (1882) 10 Q.B.D. 572.

^d *London Joint Stock Bank v. Simmons*, [1892] A.C. 217. ^e (1873) L.R. 8 Q.B. 374.

¹ After a defense of fraud, illegality, etc., is proved, *D* must show that he is a holder in due course, that is, that he gave value and the circumstances under which he took the instrument. *Neg. Inst. Law*, § 59 (N.Y. § 98). *Canajoharie N.B. v. Diefendorf*, (1890) 123 N.Y. 191.

jury found that he was a *bona fide* holder for value of the debenture, but the court held that he could not recover, because, in spite of the wording of the debenture, it was an instrument under seal^a and therefore could not be, what it purported to be, a negotiable instrument assignable by delivery. The plaintiff therefore could not recover because in these circumstances he could have no better title than his assignor, the thief.¹

Had the debenture been a negotiable instrument, the plaintiff could have recovered; for, as Blackburn, J., said, in speaking of such contracts:

"The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."^b

323. Additions to list of negotiable instruments. The case further shows that a man cannot make an instrument negotiable at his pleasure, by making it payable to bearer, if in so doing he depart from a settled rule of the common law; and it has also been frequently cited as authority for the proposition that, so far as documents made in England by English merchants are concerned, the list of negotiable instruments is closed, and that no evidence of usage will avail unless the incident of negotiability has been annexed by the law merchant to the instrument in question. The Court of Exchequer Chamber in *Goodwin v. Roberts*^c questioned its authority on this point, and in *Bechuana-land Exploration Co. v. London Trading Bank*,^d Kennedy, J., held that it was overruled by *Goodwin v. Roberts*. He allowed recent mercantile usage, sufficiently proved, to make negotiable certain debentures, issued in England by an English company, made payable to bearer but not corresponding in character to any instrument negotiable by the law merchant or by statute.

The decision in this case was subsequently followed and strongly approved by Bigham, J., in *Edelstein v. Schuler & Co.*^e The law merchant, it was there laid down, must not be regarded

^a But note the effect of § 91 of the Bills of Exchange Act in making valid the negotiable instruments of corporations issued under seal.

^b L.R. 8 Q.B. p. 382.

^d [1908] 2 Q.B. 668.

^c (1876) L.R. 10 Ex. 237, 246.

^e [1902] 2 K.B. 144.

¹ But under the Negotiable Instruments Law, § 6 (N.Y. § 25), negotiability is not affected by the fact that the instrument bears a seal. See also *Weeks v. Ealer*, (1894) 143 N.Y. 374; *Stevens v. Philadelphia Ball Club*, (1891) 142 Pa. 52; *ante*, § 88, note.

as stereotyped and immutable; on the contrary, owing to the vast increase in the number of commercial transactions the law merchant may be modified far more quickly than was the case a century ago; and the courts will now take judicial notice of the fact that debenture bonds payable to bearer are negotiable.¹

324. Consideration not necessary as between remote parties. Before leaving this subject it is important to notice that the doctrine of consideration does not apply to negotiable instruments in the same way as to ordinary contracts. There is usually no consideration between remote parties to a bill, such as the acceptor and the payee:² there need be none between the drawer and an indorsee when, either from acceptance being refused or the bill being dishonored by the acceptor, recourse is had to the drawer.³

Moreover it is possible that *A*, who has given no value for a bill, may recover from *X* who has received no value, provided that some intermediate holder between *A* and *X* has given value for it.⁴ This is apparent if we look at the case of an "accommodation bill."

A is in need of £100, and his own credit is not perhaps good enough to enable him to borrow; but *M* is prepared to advance the money to him, if *X*, a friend of *A*, is willing to undertake the obligation to repay it (say) in three months' time. This arrangement is carried out by means of an "accommodation bill." *A* draws a bill for £100 upon *X* payable to himself or order three months after date. *X* accepts the bill, and thereby undertakes to pay the bill at maturity to the person who shall then be the holder of it. *A* negotiates the bill by indorsement to *M*, who gives him £100 for it, less a "discount" for cash. *M*, who has given value, can sue *X*, the acceptor, who has received none;⁵ but we may take the matter a stage further. *M*, who has given value, indorses the bill to *S* who receives it as a present, giving no value for it. It would seem that, *once value is given*, any subse-

¹ 45 & 46 Vict. c. 61, § 38 (2).

² *Scott v. Lifford*, (1808) 1 Camp. 246. *A* will probably have induced *X* to become the acceptor of the bill by promising to provide him with funds to meet the bill when it falls due. But if he fails to do so, and *X* is called on to meet the bill out of his own pocket, he has in effect paid money to *M* at the request of *A*; and the law thereupon implies a promise by *A* to indemnify him therefor.

³ For a variety of negotiable instruments other than bills, notes and checks, see 2 Daniel on Neg. Inst. (5th ed.) pp. 490 *et seq.*

⁴ *Heuermatte v. Morris*, (1885) 101 N.Y. 63.

⁵ *Hoffman & Co. v. Bank*, (1870, U.S.), 12 Wall. 181, 190.

⁶ *Simon v. Merritt*, (1871) 33 Iowa, 537.

⁷ *Grocers Bank v. Penfield*, (1877) 69 N.Y. 502.

quent holder can sue the acceptor or any other party to the bill prior to the giving of value. And so *S*, who has given nothing, may sue *X* who has received nothing.

An illustration is furnished by the case of *Milnes v. Dawson*,^a where the drawer of a bill of exchange indorsed it, without value, to the plaintiff; after having thus assigned his rights in the bill, though without consideration, he received scrip in satisfaction of the bill from the acceptor, the defendant.

"It would be altogether inconsistent with the negotiability of these instruments," said Parke, B., "to hold that after the indorser has transferred the property in the instrument, he may, by receiving the amount of it, affect the right of his indorsee. When the property is passed, the right to sue upon the bill follows also. A bill of exchange is a chattel, and the gift is complete by delivery coupled with intention to give."

The rules of negotiability took their rise out of the custom of merchants, which assumed that the making of a bill or note was a business transaction. Value must be given at some time in the history of the instrument; but to insist that consideration should have passed between the holder and the party sued would have defeated the object for which such instruments came into existence.

325. Original object of bills of exchange. For the object of a bill of exchange was to enable a merchant resident in one part of England to pay a creditor resident in another part of England, or abroad, without sending his debt in specie from one place to another. *A*, in London, owes £100 to *X* in Paris: *A* does not want to send gold or notes to France, and has no agent in Paris, or correspondent with whom he is in account, and through whom he can effect payment. But *M*, another merchant living in London, has a correspondent in Paris named *S*, who, according to the terms of business between them, will undertake to pay money on his account at his direction. *A* therefore asks *M*, in consideration of £100, more or less according to the rate of exchange between London and Paris, to give him an order upon the correspondent *S*. Thereupon *M* draws a bill upon *S* for the required sum, in favor of *A*. *A* indorses the bill, and sends it to his creditor *X*. *X* presents it for acceptance to *S*; if all goes well the bill is accepted by *S*, and in due time paid.

Mr. Chalmers thus compares the original object, and the modern English use, of bills of exchange:

^a (1850) 5 Exch. 950.

"A bill of exchange, in its origin, was an instrument by which a trade debt, due in one place, was transferred to another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit." ^a

326. **Bill of lading.** Though lacking the traits of negotiability the instrument known as a "bill of lading" should be noticed here. ^b

A bill of lading may be regarded in three several aspects. (1) It is a receipt given by the master of a ship acknowledging that the goods specified in the bill have been put on board; (2) it is the document which contains the terms of the contract for the carriage of the goods agreed upon between the shipper of the goods and the shipowner (whose agent the master of the ship is); and (3) it is a "document of title" to the goods, of which it is the symbol. It is by means of this document of title that the goods themselves may be dealt with by the owner of them while they are still on board ship and upon the high seas.

Three copies of the bill of lading are usually made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship, and one is forwarded to X, the consignee, who (in the normal case) on receipt of it acquires a property in the goods which can only be defeated by the exercise of the vendor's equitable right of stoppage *in transitu*. ^c

What rights its assignment confers. If a consignee assigns a bill of lading by indorsement to a holder for value, that holder has a title to the goods which overrides the vendor's right of stoppage *in transitu*, and can claim them in spite of the insolvency of the consignee and the consequent loss of the price of his goods by the consignor. ^d

His right, however, which in this respect is based upon the law merchant, is a right of property only. The assignment of the bill of lading gives a right to the goods. It did not at common law give any right to sue on the contract expressed in the bill of lading.

The Bills of Lading Act, 1855, ^e confers this right. The assignment of a bill of lading thereby transfers to the assignee not only

^a Bills of Exchange (7th ed.), Introduction, p. lxi.

^b See form of bill of lading, in the Appendix.

^c Stoppage *in transitu* is the right of the unpaid vendor, upon learning the insolvency of the buyer, to retake the goods before they reach the buyer's possession. Chalmers, *Sale of Goods* (6th ed.), 83, 89-96. For the history of this right the reader is referred to the judgment of Lord Abinger, C.B., in *Gibson v. Carruthers*, (1841) 8 M. & W. 339.

^d *Lickbarrow v. Mason*, (1787) 1 Sm. L.C. (11th ed.), 693.

^e 18 & 19 Vict. c. 111.

the property in the goods, but "all rights of suit" and "all liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with himself."¹

In what sense negotiable. But a bill of lading differs from the negotiable instruments with which we have just been dealing.

Its assignment transfers rights *in rem*, rights to specific goods, and these are in a sense wider than those possessed by the assignor, because the assignee can defeat the right of stoppage *in transitu*; therein it differs from negotiable instruments, which only confer rights *in personam*.

But though the assignee is relieved from one of the liabilities of the assignor, he does not acquire proprietary rights independently of his assignor's title: a bill of lading stolen, or transferred without the authority of the person really entitled, gives no rights even to a *bona fide* indorsee.² And again, the contractual rights conferred by statute are expressly conferred subject to equities. A bill of lading then is a contract assignable without notice; it so far resembles conveyance, that it gives a title to property, but it cannot give a better title, whether proprietary or contractual, than is possessed by the assignor; subject always to this exception, that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage *in transitu* which might have been exercised against the original consignee.³

II. ASSIGNMENT OF CONTRACTUAL RIGHTS AND LIABILITIES BY OPERATION OF LAW

327. *Outline of subject.* So far we have dealt with the voluntary assignment by parties to a contract of the benefits or the liabilities of the contract. But rules of law may also operate to transfer these rights or liabilities from one to another.

If *A* by purchase or lease acquire an interest in land of *M*, upon terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of

¹ *Gurney v. Behrend*, (1854) 8 E. & B. at p. 634.

² Many statutes make bills of lading and warehouse receipts transferable by indorsement in like manner as bills of exchange. *Stimson, Am. St. Law*, §§ 4343, 4372. These statutes have not been construed to mean that an indorsee of such a document gets thereby a better title than his indorser. *Shaw v. Railroad Co.*, (1879) 101 U.S. 557. But see *Tiedeman v. Knox*, (1880) 53 Md. 612.

³ *Shaw v. Railroad*, *supra*.

his interest to *X* will, within certain limits, operate as a transfer to *X* of those obligations.

Marriage, which once transferred to the husband conditionally the rights and liabilities of the wife, has little effect since the Act of 1882.

Representation, in the case of death or bankruptcy, effects an assignment to the executors or administrators of the deceased, or to the trustee of the bankrupt, of his rights and liabilities; but the assignment is merely a means of continuing, for certain purposes, the legal existence of the deceased or the bankrupt. The assignees of the contract take no benefit by it, nor are they personally losers by the enforcement of it against them. They represent the original contracting party to the extent of his estate and no more.

1. *Assignment of obligations upon the transfer of interests in land*

328. **Covenants affecting leasehold interests.** At common law these are said to "run with the land and not with the reversion" — that is, they pass upon an assignment of the lease, but not upon an assignment of the reversion.

(1) *Assignment of lease.* If the lessee assign his lease, the man to whom he assigns it would be bound to the landlord by the same legal duties and entitled to the same rights as his assignor, subject to the following rules:

(a) Covenants in a lease which "touch and concern the thing demised" pass to the assignee of the lease whether or no they are expressed to have been made with the lessee "and his assigns." Such are covenants to repair, to leave in good repair, to deal with the land in a specified manner.^{a 1}

(b) Covenants in a lease, which touch and concern the thing demised, but relate to something not in existence at the time of the lease, are said to pass to the assigns only if named. There is little or no authority for this rule.^{b 2}

(c) In no case does the assignee of the lease acquire benefit or liability from merely personal or collateral covenants made between his assignor and his landlord.^{c 3}

^a See cases collected in note to *Spencer's case*, (1583) 1 Sm. L.C. (11th ed.), 55.

^b *Minshull v. Oakes*, (1858) 2 H. & N. 793.

^c *Dewar v. Goodman*, [1909] A.C. 72.

¹ *Gordon v. George*, (1859) 12 Ind. 408; *Salisbury v. Shirley*, (1884) 66 Cal. 223.

² *Thompson v. Rose*, (1828, N.Y.) 8 Cow. 266; *Hansen v. Meyer*, (1876) 81 Ill. 321; *Hartung v. Witte*, (1884) 59 Wis. 285.

³ *Newburg Petroleum Co. v. Weare*, (1887) 44 Ohio St. 604.

(2) *Transfer of reversion.* The reversioner or landlord does not, at common law, by the assignment of his interest in the land transfer his rights and liabilities to the assignee.

It was not till 32 Hen. VIII, c. 34 that the law in this respect was changed. By that Act the assignee of the reversion takes the benefits, and also incurs the liabilities, of covenants entered into with his assignor. These covenants must "concern the thing demised" in accordance with the rules which govern covenants running with the land.^a The Act only applies to leases under seal, but in the case of leases from year to year, payment and acceptance of rent is held to be evidence from which a jury may infer "a consent to go on, on the same terms as before."^{b 1}

It should be noted that although an assignment of the reversion gives a right of action to the lessee against the assignee on express covenants made with the original lessor, it does not thereby exonerate the lessor from liability on these covenants.^c

(3) *Personal covenants distinguished.* Two cases will illustrate the distinction between personal, or collateral, covenants and those which concern, and are therefore assignable with, the thing demised. The first is a case of covenants running with the land, the second of covenants running with the reversion.

Hayward leased a public-house to *X*, covenanting for himself and his assigns that he would not build or keep a public-house within half a mile of the premises. *X* assigned his lease to Thomas, and Hayward broke his covenant. The covenant was personal and did not pass to the assigns of *X*; Thomas therefore had no remedy.^d

Clegg, a brewer, leased the Alexandra Hotel to Hands, who covenanted for himself and his assigns that he would buy beer only from Clegg and his assigns. Clegg retired from business, closed his brewery, and assigned his interest in the premises to one Cain. Hands refused to buy beer of Cain, and Clegg obtained an injunction to restrain him from buying beer of any one else. The Court of Appeal held that the covenant touched and concerned the thing demised.^e

And the covenant was enforced for another reason, founded on a rule which will be explained on the next page. The lessee

^a 1 Sm. L.C. (11th ed.), 63.

^b Per Willes, J., *Cornish v. Stubbs*, (1870) L.R. 5 C.P. 339.

^c *Stuart v. Joy*, [1904] 1 K.B. (C.A.) 362.

^d *Thomas v. Hayward*, (1869) L.R. 4 Exch. 311.

^e *Clegg v. Hands*, (1890) 44 Ch. D. 503.

¹ *Fisher v. Deering*, (1871) 60 Ill. 114. See Stimson, Am. St. Law, § 1352.

had obtained his lease on lower terms because it was subject to a restrictive covenant, and, since the covenant was not necessarily personal or unassignable, the court would have restrained him from departing from it, even though it had not been held to run with the land.

329. **Covenants affecting freehold interests.** At common law, covenants made *with* the owner of land, that is, promises under seal made to him, and for his benefit, pass to his assignees, provided they touch and concern the land conveyed and are not merely personal.¹

A vendor of land covenants with the purchaser that he has a good right to convey the land; the benefit of such a covenant would pass to the purchaser's assignees. Not so a covenant relating to some matter purely personal between the vendor and purchaser.

But covenants entered into *by* the owner of land, restricting his enjoyment of the land, do not at common law bind his assignees, except he thereby create certain well-known interests, known as easements and profits, recognized by law.²

If a man endeavor to create restrictions on his land which are not included in the circle of rights *in re aliena* known to the common law, he cannot affix those rights to the land so as to bind subsequent owners.³ The cases which deal with attempts to create "an easement in gross" illustrate this proposition, the principle of which is thus enunciated by Lord Brougham in *Kepel v. Baily*:⁴

"It must not be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. . . . Great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands however remote."

Restrictive covenants in equity. To this rule equity, regarding such covenants as binding the person not the land, has created a group of exceptions limited in character. Where a man sells

^a *Stockport Waterworks Co. v. Potter*, (1864) 3 H. & C. 300.

^b (1834) 2 Myl. & K. 535.

¹ *Shaber v. St. Paul Water Co.*, (1883) 30 Minn. 179; *Mygatt v. Coe*, (1891) 124 N.Y. 212.

² But see *Inhabitants of Middlefield v. Church Mills Knitting Co.*, (1894) 160 Mass. 267; *Whittenton Mfg. Co. v. Staples*, (1895) 164 Mass. 319; *Fitch v. Johnson*, (1882) 104 Ill. 111; *Nye v. Hoyle*, (1890) 120 N.Y. 195 [cf. *Cole v. Hughes*, (1873) 54 N.Y. 444]; *Hickey v. Ry.*, (1894) 51 Ohio St. 40.

land and covenants with the buyer that he will only use the adjoining land in a certain way, or where land has been bought or hired with similar covenants as to its use, such restrictive covenants will bind any one who subsequently acquires the land *with notice of their existence.*^{a 1} Hence they are sometimes known as "equitable easements."^b

The covenants must be *restrictive* covenants; they are covenants to use or abstain from using, and the result of the cases decided on the authority of *Tulk v. Moxhay* is "that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice."^c The principle cannot be applied to compel a lessee to enforce such covenants against his sub-tenant.^d

The rule is thus stated by Lord Cottenham:

"That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. . . . It is said that the covenant, being one which does not run with the land, this court cannot enforce it; but the question is, *not whether the covenant runs with the land, but whether a party shall be permitted to use his land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.*"^e

An interesting but unsuccessful attempt was made in *Taddy v. Sterious*^f to apply this principle to a sale of goods, and to impose a condition which would give a right of action to the vendor against every subsequent purchaser who broke the condition.

2. Assignment of contractual obligation upon marriage

330. **Wife's antenuptial contracts.** The effect of marriage, in this respect, is that if the separate estate of the wife be insufficient to satisfy her antenuptial contracts the husband is liable to the extent of all property to which he shall have become entitled through his wife.^{g 2}

^a As to the rights conferred by such covenants upon purchasers *inter se*, and upon a purchaser against a vendor who retains a portion of the adjoining land, see *In re Birmingham Land Co. and Allday*, [1893] 1 Ch. 348. But it would appear that such covenants must be made in respect of adjoining land. If a purchaser sells all his property subject to covenants restrictive of its use, these covenants are personal and collateral and do not pass to assignee! *Formby v. Barker*, [1903] 2 Ch. 539.

^b *Re Nisbet & Potts*, [1906] 1 Ch. 386 (C.A.).

^c *Haywood v. Brunswick Building Society*, (1881) 8 Q.B.D. 410.

^d *Hall v. Ewin*, (1887) 37 Ch.D. (C.A.) 74.

^e *Tulk v. Moxhay*, (1848) 2 Ph. 777.

^f [1904] 1 Ch. 354.

^g 45 & 46 Vict. c. 75, §§ 13, 14.

¹ *Lewis v. Gollner*, (1891) 129 N.Y. 227; *Hodge v. Sloan*, (1887) 107 N.Y. 244. Cf. *Norcross v. James*, (1885) 140 Mass. 188.

² Formerly he was liable absolutely, and this is still so unless changed

3. Assignment of contractual obligation by death

331. Rights of representatives. Death passes to the representatives of the deceased all his personal estate, all his devisable real estate, all rights of action (including rights of action for breach of contract) affecting this estate, and all liabilities chargeable upon it.^a But in the case of real estate this assignment is temporary, and for the purpose only of securing creditors who may have claims on the real estate.^b Covenants which are attached to leasehold estate pass, as to benefit and liability, with the personalty, to the representatives; while covenants affecting freehold, such as covenants for title in a conveyance of freehold property, pass, so soon as the property is handed over by the representatives, to the heir or devisee of the realty.

332. Contracts dependent on personal skill or service. But performance of such contracts as depend upon the personal service or skill of the deceased cannot be demanded of his representatives, nor can they insist upon offering such performance.¹ Contracts of personal service expire with either of the parties to them:² an apprenticeship contract is terminated by the death of the master, and no claim to the services of the apprentice survives to the executor.^c

Nor can executors sue for a breach of contract which involves a purely personal loss. In *Chamberlain v. Williamson*,^d an executor sued for a breach of promise to marry the deceased. The promise had been broken and the right of action accrued in the lifetime of the testatrix. But the court held that such an action could not be brought by representatives, since it was not certain that the breach of contract had resulted in damage to the estate. "Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered as an increase of the transmissible personal estate."³

^a 60 & 61 Vict. c. 65, § 1.

^b *Formby v. Barker*, [1903] 2 Ch. 549, 550.

^c *Barter v. Burfield*, (1747) 2 Str. 1266.

^d (1814) 2 M. & S. 408, 416.

by statute, even though the statute gives the wife the sole enjoyment of her separate estate. *Platner v. Patchin*, (1865) 19 Wis. 333; *Alexander v. Morgan*, (1877) 31 Ohio St. 546. But see *Howarth v. Warmser*, (1871) 58 Ill. 48; *Wood v. Orford*, (1877) 52 Cal. 412. Statutes now generally exempt the husband except to the extent of property received through the wife. *Stimson*, Am. St. Law, § 6402.

¹ *Dickinson v. Calahan's Adm'r*, (1852) 19 Pa. 227. Compare *Billings's Appeal*, (1884) 106 Pa. 558; *Drummond v. Crane*, (1893) 159 Mass. 577.

² *Lacy v. Getman*, (1890) 119 N.Y. 109; *Siler v. Gray*, (1882) 86 N.C. 566.

³ *Hovey v. Page*, (1867) 55 Me. 142.

In *Finlay v. Chirney*,^a a converse proposition was laid down, and the court held that no action would lie against the executors of a man who in his lifetime had broken a promise to marry. And in *Quirk v. Thomas*,^b a claim even for special damage alleged to have been suffered by the plaintiff in a similar action was rejected.¹

4. Assignment of contractual obligation by bankruptcy²

333. English statutory provisions. Bankruptcy is regulated by the Bankruptcy Act, 1914, which repealed and re-enacted with amendments and additions the existing statutes on the subject. Proceedings in bankruptcy commence with the filing of a petition in the court of bankruptcy either by a creditor alleging acts of bankruptcy against the debtor or by the debtor himself alleging inability to pay his debts. Unless this petition prove unfounded the court makes a receiving order and appoints an official receiver who takes charge of the debtor's estate and summons a meeting of the creditors.

If the creditors decide not to accept a composition, but make the debtor bankrupt, he is adjudged bankrupt and a trustee appointed.

To the trustee passes all the property of the bankrupt vested in him at the time of the act of bankruptcy or acquired by him before discharge, and the capacity for taking proceedings in respect of such property; but all that we are concerned with in respect of the rights and liabilities of the trustee is to note that —

(i) Where any part of the property of a bankrupt consists of *choses in action*, they shall be deemed to have been duly assigned to the trustee:

(ii) He may, within twelve months of his appointment, disclaim, and so discharge unprofitable contracts:

(iii) He is probably excluded from suing for "personal injuries arising out of breaches of contract, such as contracts to cure or to marry," even though "a consequential damage to the personal estate follows upon the injury to the person."^c

But the trustee, as statutory assignee of the bankrupt's *choses in action*, is not in the same position as an ordinary assignee for value; he only takes subject to all equities existing in such *choses in action* at the date of the commencement of the bankruptcy.^d If therefore a *chose in action* has been assigned for value before the bankruptcy took place, and no notice of assignment given to the debtor, the trustee cannot acquire priority over the assignee by being the first to give notice.

^a (1888) 20 Q.B.D. (C.A.) 494.

^c *Drake v. Beckham*, (1843) 11 M. & W. 319.

^b [1916] 1 K.B. 516.

^d *In re Wallis*, [1902] 1 K.B. 719.

¹ *Wade v. Kalbfleisch*, (1874) 58 N.Y. 282; *Chase v. Fitz*, (1882) 132 Mass. 359.

² The Constitution of the United States confers upon Congress the power "to establish uniform laws on the subject of bankruptcies throughout the United States." Art. I, § 8. If Congress does not pass such laws the states are free to do so, though the state laws have no extraterritorial effect. *Gilman v. Lockwood*, (1866, U.S.) 4 Wall. 409; *Guernsey v. Wood*, (1881) 130 Mass. 503. National bankruptcy laws have been in force from 1800 to 1803, from 1841 to 1843, from 1867 to 1878, and since July 1, 1898.

CHAPTER XI

Joint Contracts. Joint and Several Contracts.¹

334. Classification. A contract may, as to the number of parties involved, be constituted in any one of the following ways: (1) one promisor and one promisee; (2) two or more promisors and one promisee; (3) one promisor and two or more promisees; (4) two or more promisors and two or more promisees.

The first is the normal case, and calls for no special consideration under this topic.

The second may constitute: (a) a series of independent obligations contained in one document, as the several promises in a subscription paper; (b) a joint obligation in which all the promisors are treated collectively as one promisor, as in a partnership contract; (c) a joint obligation of all collectively and also the several obligations of each individually. It is a question of construction whether the obligation falls in one or another of these three classes.

The third may be either, (a) a promise to all the promisees jointly, or (b) a promise to each promisee severally; but it cannot be both joint and several.

The fourth involves merely a combination of the second and third.

335. Two or more promisors. (a) The case of numerous independent promises contained in the same document, as a subscription paper, is to be treated in the same way as if each was a separate document. The paper usually reads in substance "we promise to pay the sums set opposite our respective names," and

¹ This chapter was written by the editor of the previous American edition, Professor E. W. Huffcut. The present editor wishes merely to observe that we should not allow any fiction of unity or *jointness* to blind us to the fact that the legal relations between joint promisors and a promisee are "paucital" and not "unital." The relations of a promisee with each of two joint promisors are separate relations; he has a right against each, and each of them owes him a duty. But on breach the secondary right to judgment against one is conditional upon a joinder of the other as a co-defendant. Hence, if A and B jointly promised X to repay \$100 lent by him to A alone, B is a guarantor of the *debt* of another and his promise should be held to be within the statute of frauds. See, however, *contra*, Gibbs v. Blanchard, (1867) 15 Mich. 292. In the case of joint promisees the analysis is similar.

thereby discloses its true construction as a series of separate contracts.¹

(b) Whenever an obligation is undertaken by two or more persons, it is the general presumption of the common law that it is a joint obligation, and there should be words of severance in order to create a joint and several liability.² But contracts which would be joint by the common law rule of construction are, in many states, required by statute to be construed as joint and several unless containing an express indication of an intent that they should be joint.³ A note signed by two or more persons beginning "we promise to pay" is a joint note, while one beginning "I promise to pay" is joint and several.⁴ Partnership contracts are joint.⁵

(c) If the obligation is joint and several there are as many several contracts as there are promisors and, in addition, one joint contract. The usual form is "we jointly and severally promise," or "we, and each of us, promise;" but these words are not necessary, and whether a contract is joint, or is joint and several, is a matter of construction.⁶

336. **Joint promisors.** Subject to changes made by statutes,⁷ the following rules govern cases of joint obligations.

(1) All surviving joint obligors within the jurisdiction, not discharged by law, must be joined in the action.⁸ Statutes in many states have changed this rule by permitting contracts which would be joint at common law to be treated as joint and several.⁹

¹ *Cornish & Co. v. West*, (1901) 82 Minn. 107; *Davis v. Belford*, (1888) 70 Mich. 120; *Valade v. Masson*, (1903) 135 Mich. 41; *Landwerlen v. Wheeler*, (1886) 106 Ind. 523.

² *Alpaugh v. Wood*, (1891) 53 N.J. L. 638; *Eller v. Lacy*, (1893) 137 Ind. 436; *Philadelphia v. Reeves*, (1865) 48 Pa. 472; *Mints v. Tri-County N.G. Co.*, (1918, Pa.) 103 Atl. 285.

³ *Stimson*, Am. St. Law, § 4113.

⁴ *Am. Neg. Inst. L.* § 17 (N.Y. § 36); *Dart v. Sherwood*, (1859) 7 Wis. 523; *Monson v. Drakeley*, (1873) 40 Conn. 552.

⁵ *Harrison v. McCormick*, (1886) 69 Cal. 616; *Ryerson v. Hendrie*, (1867) 22 Iowa, 480; *Pope v. Cole*, (1873) 55 N.Y. 124.

⁶ See, on construction, *Leake on Contracts* (3d ed.), 378-383.

⁷ See 43 L.R.A. 165-184 for such statutes.

⁸ *Bragg v. Wetsell*, (1839, Ind.) 5 Blackf. 95; *Philadelphia v. Reeves*, (1865) 48 Pa. 472; *Sundberg v. Goar*, (1904) 92 Minn. 143. If no objection is made by the defendants sued, the non-joinder is waived; but those not joined are discharged by judgment against the others. When a defendant is sued by a single individual he cannot set off a joint claim that he has against this plaintiff and several others. *Mints v. Tri-State N.G. Co. supra*.

⁹ *Stimson*, Am. St. Law, § 4113; N.Y. Code Civ. Proc. §§ 1932, 1946. See *Suydam v. Barber*, (1858) 18 N.Y. 468.

(2) Upon the death of one joint obligor the entire liability remains with the survivors, and the estate of the deceased obligor is not liable.¹ Upon the death of the last surviving obligor his estate remains liable.² Statutes have very generally changed this rule so that the estates of deceased obligors may be charged.³

(3) A judgment against one joint obligor is a bar to an action against another or against all jointly.⁴ But an exception is sometimes made in cases where when the first was sued the other was outside the jurisdiction.⁵

(4) A voluntary release of one joint obligor is a release of all.⁶ A covenant not to sue one will not operate as a technical release, and a release of one reserving the obligee's rights against the other is generally construed as a covenant not to sue.⁷ By statute joint-debtors may be released separately.⁸

(5) When joint parties are equally liable as among themselves, and one pays the entire obligation, he is entitled to contribution from the others.⁹ In an action for aliquot portions he may proceed at law in quasi-contract;¹⁰ but if one of his co-obligors is insolvent and he wishes to obtain a *pro rata* contribution from the solvent ones he must proceed in equity.¹¹

337. Joint and several promisors. The following rules govern the case of joint and several promisors.

(1) Joint and several promisors may all be joined in one ac-

¹ *Davis v. Van Buren*, (1878) 72 N.Y. 587.

² *Neal's Ex'rs v. Gilmore*, (1875) 79 Pa. 421.

³ *Stimson*, Am. St. Law, § 4113; N.Y. Code Civ. Proc. § 758. See *Potts v. Dounce*, (1903) 173 N.Y. 335.

⁴ *King v. Hoare*, (1844) 13 M. & W. 494; *Kendall v. Hamilton*, (1879) 4 App. C. 504; *Mason v. Eldred*, (1867, U.S.) 6 Wall. 231, where, however, the statutory change is indicated; *Candee v. Smith*, (1883) 93 N.Y. 349 (noting statutory change); *Heckemann v. Young*, (1892) 134 N.Y. 170. For statutory changes see *Stimson*, Am. St. Law, § 5015; *Black on Judgments*, § 208.

⁵ *Cox v. Maddux*, (1880) 72 Ind. 206; *Merriman v. Barker*, (1889) 121 Ind. 74. See 43 L.R.A. 162, note.

⁶ *Hale v. Spaulding*, (1888) 145 Mass. 482; *Scofield v. Clark*, (1896) 48 Neb. 711.

⁷ *Whittemore v. Judd & Co.*, (1891) 124 N.Y. 565; *Parmelee v. Lawrence*, (1867) 44 Ill. 405; *Price v. Barker*, (1855) 4 El. & Bl. 760.

⁸ *Stimson*, Am. St. Law, § 5013; N.Y. Code Civ. Proc. § 1942.

⁹ *Jeffries v. Ferguson*, (1885) 87 Mo. 244; *Chipman v. Morrill*, (1862) 20 Cal. 131; *Durbin v. Kuney*, (1890) 19 Ore. 71; *Norton v. Coons*, (1846, N.Y.) 3 Den. 130.

¹⁰ *Jeffries v. Ferguson*, *supra*; *Tobias v. Rogers*, (1855) 13 N.Y. 59; *Johnson v. Harvey*, (1881) 84 N.Y. 363.

¹¹ *Easterly v. Barber*, (1876) 66 N.Y. 433.

tion, or each may be sued separately, but an intermediate number may not be joined.¹

(2) Upon the death of one of the joint and several obligors the joint liability rests only upon the survivors; the separate liability of the deceased may be enforced against his estate, but his executor cannot be joined with the survivors in one action.²

(3) A judgment against one of the joint and several promisors is not a bar to an action against another.³ An action against one alone has been held to be a bar to a joint action against the others, and it is suggested as a bar to a joint action against all.⁴ So a judgment against all jointly has been held to be a bar to an action against each separately on the theory of election of remedies.⁵ But other cases argue that a joint judgment is no bar to separate actions until it is satisfied.⁶

(4) A release of one of the joint and several promisors is a release of all.⁷ But a covenant not to sue one, or any release so construed, will not release the others.⁸

338. Joint promisees. All surviving joint promisees must join in the action.⁹ If one dies the right of action is in the survivors.¹⁰ Upon the death of the last survivor the right of action is in his representative.¹¹ A release by one joint promisee is, in the absence of collusion or fraud, a bar to an action by the others.¹² So an accord and satisfaction of the debt made with one or more

¹ *Cummings v. People*, (1869) 50 Ill. 132; *Fay & Co. v. Jenks & Co.*, (1889) 78 Mich. 312.

² *May v. Hanson*, (1856) 6 Cal. 642; *Eggleston v. Buck*, (1863) 31 Ill. 254.

³ *Giles v. Canary*, (1884) 99 Ind. 116; *Fitzgerald v. Burke*, (1890) 14 Colo. 559.

⁴ *Bangor Bank v. Treat*, (1829, Me.) 6 Greenl. 207. But see *Turner v. Whitmore*, (1874) 63 Me. 526.

⁵ *United States v. Price*, (1850, U.S.) 9 How. 83; *Sessions v. Johnson*, (1877) 95 U.S. 347 (*semble*); *Weil v. Guerin*, (1884) 42 Ohio St. 299.

⁶ *Moore v. Rogers*, (1857) 19 Ill. 347; *People v. Harrison*, (1876) 82 Ill. 84; *Turner v. Whitmore*, (1874) 63 Me. 526.

⁷ *American Bank v. Doolittle*, (1833, Mass.) 14 Pick. 123; *Hochmark v. Richler*, (1891) 16 Colo. 263.

⁸ *Rowley v. Stoddard*, (1811, N.Y.) 7 Johns. 207; *Morgan v. Smith*, (1877) 70 N.Y. 537; *Crane v. Alling*, (1836) 15 N.J. L. 423.

⁹ *Sweigart v. Berk*, (1822, Pa.) 8 Serg. & R. 308; *Ehle v. Purdy*, (1831, N.Y.) 6 Wend. 629; *Angus v. Robinson*, (1887) 59 Vt. 585; *Slaughter v. Davenport*, (1899) 151 Mo. 26.

¹⁰ *Donnell v. Manson*, (1872) 109 Mass. 576; *Hedderly v. Downs*, (1883) 31 Minn. 183; *Indiana &c. Ry. v. Adamson*, (1887) 114 Ind. 282.

¹¹ *Stowell's Adm'r v. Drake*, (1852) 23 N.J. L. 310.

¹² *Pierson v. Hooker*, (1803, N.Y.) 3 Johns. 68; *Clark v. Patton*, (1830, Ky.) 4 J. J. Marsh. 33; *Myrick v. Dame*, (1852, Mass.) 9 Cush. 248.

joint creditors in any form is a discharge of the debt as to all the creditors.¹

339. **Joint or several promisees.** The promisees must be either joint *or* several, they cannot be joint *and* several.² If construed to be joint all must join in the action;³ if construed to be several a joinder of the promisees is improper.⁴ When the language of the promise is at all open to construction and the interest of the promisees is joint the right of action is joint;⁵ but if the interest is several the right of action is several, and each must sue separately.⁶

¹ *Osborn v. Martha's Vineyard R. Co.*, (1886) 140 Mass. 549; *Lyman v. Gedney*, (1885) 114 Ill. 388.

² *Eveleth v. Sawyer*, (1902) 96 Me. 227; *Capen v. Barrows*, (1854, Mass.) 1 Gray, 376. See *Lyon v. Ballentine*, (1886) 63 Mich. 97. There seems to be no valid reason for this rule, but it is well established by precedent. See *Slingsby's Case*, (1588) 5 Co. Rep. 18b; *Keightley v. Watson*, (1849) 3 Exch. 716. Promises to A or B have been held enforceable by either. *Ellis v. McLemore*, (1827, S.C.) 1 Bailey, 13; *Record v. Chisum*, (1860) 25 Tex. 348. If there may be alternative promisees, why may not one alternative be to joint promisees and the other to each severally? See *Goldsmith v. Sachs*, (1882) 17 Fed. 726, 728.

³ *Willoughby v. Willoughby*, (1830) 5 N.H. 244; *Slaughter v. Davenport*, (1899) 151 Mo. 26; *Clapp v. Pawtucket Inst.*, (1887) 15 R.I. 489.

⁴ *Boggs v. Curtin*, (1823, Pa.) 10 Serg. & R. 211; 497; *Curry v. Ry.*, (1897) 58 Kans. 6; *Rorabacher v. Lee*, (1867) 16 Mich. 169; *Cobb v. Monjo*, (1904) 90 N.Y. App. Div. 85.

⁵ *Eveleth v. Sawyer*, *supra*; *Capen v. Barrows*, *supra*.

⁶ *Burton v. Henry*, (1890) 90 Ala. 281; *Morgan v. Wordell*, (1901) 178 Mass. 350; *Jewett v. Cunard*, (1847) 3 Woodb. & M. 277, 321, S.C. 13 Fed. Cas. 594; *Emmeluth v. Home Benefit Ass'n*, (1890) 122 N.Y. 130; *Sharp v. Conkling*, (1844) 16 Vt. 355.

CHAPTER XII

Proof of the Operative Facts. Rules relating to Evidence

340. **Provinces of court and jury.** If a dispute should arise as to the terms of a contract made by word of mouth, it is necessary in the first instance to ascertain what was said, and the circumstances under which the supposed contract was formed. These would be questions of fact to be determined by a jury. When a jury has found, as a matter of fact, what the parties said, and that they intended to enter into a contract, it is for the court to say whether what they have said amounts to a contract, and, if so, what its effect may be. When a man is proved to have made a contract by word of mouth upon certain terms, he cannot be heard to allege that he did not mean what he said.¹

The same rule applies to contracts made in writing. When men have put into writing any part of their contract they cannot alter by parol evidence that which they have written. When they have put into writing the whole of their contract they cannot add to or vary it by parol evidence.

Contracts wholly oral may, as regards this part of my subject, be dismissed at once. For the proof of a contract made by word of mouth is a part of the general law of evidence; the question whether what was proved to have been said amounts to a valid contract must be answered by reference to the formation of contract: the interpretation of such a contract when proved to have been made may be dealt with presently under the head of rules of construction.

341. **Three matters of inquiry.** All that we are concerned with here is to ascertain the circumstances under which extrinsic oral evidence is admissible in relation to written contracts and contracts under seal. Such evidence is of three kinds:

(1) Evidence as to the fact that there is a document purporting to be a contract, or part of a contract.

(2) Evidence that the professed contract is in truth what it professes to be. It may lack some element necessary to the formation of contract, or be subject to some parol condition upon which its existence as a contract depends.

¹ See *ante*, § 178.

(3) Evidence as to the terms of the contract. These may be incomplete, and may need to be supplemented by parol proof of the existence of other terms; or they may be ambiguous and then may be in like manner explained; or they may be affected by a usage the nature of which has to be proved.

We thus are obliged to consider —

- (1) evidence as to the existence of a document;
- (2) evidence that the document is a contract;
- (3) evidence as to its terms.

342. Difference between formal and simple contract. We must note that a difference, suggested some time back, between contracts under seal and simple contracts, is illustrated by the rules of evidence respecting them. A contract under seal derives its validity from the form in which it finds expression: therefore if the instrument is proved the contract is proved, unless it can be shown to have been executed under circumstances which preclude the formation of a contract, or to have been delivered under conditions which have remained unfulfilled, so that the deed is no more than an escrow.¹

But "a written contract not under seal is not the contract itself, but only evidence, the record of the contract." ^a Even where statutory requirements for writing exist, as under the Statute of Frauds, the writing is no more than evidentiary of a previous or contemporaneous agreement. A written offer containing all the terms of the contract signed by *A* and accepted by performance on the part of *B*, is enough to enable *B* to sue *A* under that section. And where there is no such necessity for writing, it is optional to the parties to express their agreement by word of mouth, by action or by writing, or partly by one, and partly by another of these processes.

It is always possible therefore that a simple contract may have to be sought for in the words and acts, as well as in the writing of the contracting parties. But in so far as they have reduced their meaning to writing, they cannot adduce evidence in contradiction or alteration of it. "They put on paper what is to

^a *Wake v. Harrop*, (1861) 6 H. & N. 775.

¹ For various senses in which the term contract is often used, see *ante*, § 9 and notes. In the present connection it is used to refer to the *document*. In any case the document may be a fact having operative legal effect, at least in the introduction of evidence. If the document is sealed, its operative effect is much greater. See *ante*, §§ 80-84. Even in this case, however, it is not the only operative fact; the acts of the parties connected with the execution of the instrument are likewise vitally operative facts.

bind them, and so make the written document conclusive evidence between them." ^a

1. *Proof of documents*

343. Proof of contract under seal. A contract under seal is proved by evidence of the sealing and delivery. Formerly it was necessary to call one of the attesting witnesses where a contract under seal was attested, but now by statute ^b this is no longer required save in those exceptional cases in which attestation is necessary to the *validity* of the deed. A warrant of attorney and a *cognovit* ^c afford instances of instruments to which attestation is thus necessary. ²

344. Proof of simple contract. In proving a simple contract parol evidence is always necessary to show that the party sued is the party making the contract and is bound by it. ^e And oral evidence must of course supplement the writing where the writing only constitutes a part of the contract. For instance: *AB* in Oxford writes to *X* in London, "I will give £50 for your horse; if you accept send it by next train to Oxford. (Signed) *AB*." To prove the conclusion of the contract it would be necessary to prove the despatch of the horse. And so if *A* puts the terms of an agreement into a written offer which *X* accepts by word of mouth; or if, where no writing is necessary, he puts a part of the terms into writing and arranges the rest by parol with *X*, oral evidence must be given in both these cases to show that the contract was concluded upon those terms by the acceptance of *X*. ^d

So too where a contract consists of several documents which

^a *Wake v. Harrop, supra.*

^b 28 & 29 Vict. c. 18.

^c As a matter of practice, written contracts are commonly admitted by the parties, either upon the pleadings, or upon notice being given by one party to the other to admit such a document. Such admissions are regulated by Order xxxii of the Rules of the Supreme Court. Or one party may call upon the other to produce certain documents, and upon his failing to do so, and upon proof having been given of the notice to produce, the party calling for production may give secondary evidence of the contents of the document.

^d *Harris v. Rickett, (1869) 4 H. & N. 1.*

¹ See *ante*, § 76.

² The common law required the evidence of the subscribing witness to prove any document. The rule was relaxed as to instruments not under seal. *Hall v. Phelps, (1807, N.Y.) 2 Johns. 451*; but was rigidly adhered to in the case of sealed instruments. *Fox v. Reil, (1808, N.Y.) 3 Johns. 477* (where the historical reasons are given); *Story v. Lovett, (1851, N.Y.) 1 E.D. Smith, 153*. The common-law rule has been greatly modified by statutes which provide in general that the subscribing witness need not be called save in the cases where a subscribing witness is necessary to the validity of the document. See N.Y. L. 1883, c. 195; N.Y. Code Civ. Proc. §§ 935-37; Wigmore on Evidence, § 1290, note 4. The same result was reached in some states without the aid of statutes. *Sanborn v. Cole, (1891) 63 Vt. 590*.

need oral evidence to show their connection, such evidence may be given to connect them.¹ This rule needs some qualification as regards contracts of which the Statute of Frauds requires a written memorandum. The documents must in such a case contain a reference, in one or both, to the other, in order to admit parol evidence to explain the reference and so to connect them.*²

In contracts which are outside the statute evidence would seem to be admissible to connect documents without any such internal reference. "I see no reason," says Brett, J., "why parol evidence should not be admitted to show what documents were intended by the parties to form an alleged contract of insurance."³

There are circumstances, such as the loss or inaccessibility of the written contract, in which parol evidence of the contents of a document is allowed to be given, but these are a part of the general law of evidence, and the rules which govern the admissibility of such evidence are to be found in treatises on the subject.

2. Evidence as to fact of agreement

345. Evidence as to invalidity. Thus far we have dealt with the mode of bringing a document, purporting to be an agreement, or part of an agreement, before the court. But extrinsic evidence is admissible to show that the document is not in fact a valid agreement.⁴

It may be shown by such evidence that the contract was invalid for want of consideration, of capacity of one of the parties of genuineness of consent, of legality of object. Extrinsic evidence is used here, not to alter the purport of the agreement, but to show that there never was such an agreement as the law would enforce.⁴

^a Long v. Millar, (1879) 4 C.P.D. 456.

^b Edwards v. Aberayron Mutual Insurance Society, (1875) 1 Q.B.D. 587.

¹ Colby v. Dearborn, (1879) 59 N.H. 326; Wilson v. Tucker, (1873) 10 R.I. 578.

² Coe v. Tough, (1889) 116 N.Y. 273; O'Donnell v. Leeman, (1857) 43 Me. 158. That courts are very liberal in the admission of parol evidence to connect separate documents, see Beckwith v. Talbot, (1877) 95 U.S. 289; Lerner v. Wannemacher, (1864, Mass.) 9 Allen, 412.

³ Of course a *document* is not an *agreement* at all. What is meant here is that it is not conclusive evidence of an agreement, and that in the absence of certain other facts the document is not itself an operative fact creating contractual relations.

⁴ Walker v. Ebert, (1871) 29 Wis. 194; Barrett v. Buxton, (1826, Vt.) 2 Aikens, 167; Sterling v. Sinnickson, (1820) 5 N.J. L. 756.

346. Evidence of condition suspending operation of contract. It may also be shown by extrinsic evidence that a parol condition suspended the operation of the contract. Thus a deed may be shown to have been delivered subject to the happening of an event or the doing of an act. Until the event happens or the act is done the deed remains an *escrow*, and the terms upon which it was delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument.¹

In like manner the parties to a written contract may agree that, until the happening of a condition which is not put in writing, the contract is to remain inoperative.

Campbell agreed to purchase of the Messrs. Pym a part of the proceeds of an invention which they had made. They drew up and signed a memorandum of this agreement on the express verbal understanding that it should not bind them until the approval of one Abernethie had been expressed. Abernethie did not approve of the invention, and Campbell repudiated the contract. Pym contended that the agreement was binding, and that the verbal condition was an attempt to vary by parol the terms of a written contract. The court held (and its decision has been affirmed in a later case²) that evidence of the condition was admissible on the ground thus stated by Erle, J.:

"The point made is, that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional: and if that had been so it would have been wrong. But I am of opinion that *the evidence showed that in fact there was never an agreement at all*. The parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defense may be set up without ground; and I agree that a jury should therefore always look on such a defense with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is, that *evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible*." ^{b 2}

^a *Pattle v. Hornbrook*, [1897] 1 Ch. 25.

^b *Pym v. Campbell*, (1856) 6 E. & B. 374.

¹ This is one of the important limitations of the parol evidence rule. It is possible, by antecedent or contemporaneous parol expressions, for the parties to limit the operative legal effect of the physical delivery of a document on its face perfect and complete. The operative facts controlling their legal relations include parol expressions as well as the existence of the document and the act of delivering it. See *ante*, § 82.

² *Reynolds v. Robinson*, (1888) 110 N.Y. 654; *Westman v. Krumweide*,

3. Evidence as to the terms of the contract

347. General rule. When we come to extrinsic evidence as affecting the terms of a contract, the admissibility of such evidence is narrowed to a small compass; for "according to the general law of England the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties." ^a

Arthur was lessee of a theatre and covenanted in the lease to pay the rent quarterly in advance. Before the lease was finally executed, the parties had agreed by parol that Arthur should pay each quarter by a three months bill, which he duly tendered but which was refused by the lessor. The lessor sued for the rent, which Arthur alleged that he had paid according to the parol agreement. The Court of Appeal said that the covenant meant payment in cash; that payment by bill was not payment in cash; and that therefore the parol agreement contradicted the terms of the lease and evidence of it could not be admitted. ^b

348. Exceptions. We find exceptions to this rule —

- (a) where supplementary or collateral terms are admitted in evidence to complete a contract the rest of which is in writing;
- (b) where explanation of terms in a contract is needed;
- (c) where usages are introduced into a contract;
- (d) where in the case of mistake special equitable remedies may be applicable.

349. Supplementary and collateral terms. If the parties to a contract have not put all its terms into writing, evidence of the

^a Blackburn, J., in *Burges v. Wickham*, (1863) 3 B. & S. 696.

^b *Henderson v. Arthur*, [1907] 1 K.B. 10.

(1883) 30 Minn. 313; *Blewitt v. Boorum*, (1894) 142 N.Y. 357; *Sutton v. Griebel*, (1902) 118 Iowa, 78; *Ada Dairy Ass'n v. Mears*, (1900) 123 Mich. 470; *Ware v. Allen*, (1888) 128 U.S. 590. In cases like *Pym v. Campbell*, *supra*, there is in fact an agreement or consensus of minds, and there may also be a contract as well; but the words and other acts of the parties are such that the document is not the sole evidence of the terms of the contract and may not be an operative fact at all. In the case of an *escrow* there is an agreement creating a binding contract, but the rights and duties are conditional. Neither party has either the privilege or power of withdrawing. Likewise the "approval of one Abernethie" may be a condition in an already completed contract. If, on the other hand, the parties agree that until the fulfillment of some condition each is still privileged to withdraw, the existing relations should hardly be called *contract*. Parol evidence may therefore be admissible either to show that there is as yet no contract for the reason that neither party has as yet any rights or duties and has as yet given up no privileges or powers, or to show that the terms expressed in the document do not include all the terms agreed upon. See *post*, § 349.

supplementary terms is admissible, not to vary but to complete the written contract.

Jervis agreed to assign to Berridge a contract for the purchase of lands from *M*. The assignment was to be made upon certain terms, and a memorandum of the bargain was made in writing, from which at the request of Berridge some of the terms were omitted. In fact the memorandum was only made in order to obtain a conveyance of the lands from *M*. When this was done and Berridge had been put in possession he refused to fulfill the omitted terms, which were in favor of Jervis. On action being brought he resisted proof of them, contending that the memorandum could not be added to by parol evidence. Lord Selborne, however, held that the memorandum was "a mere piece of machinery obtained by the defendant *as subsidiary to and for the purposes of the verbal and only real agreement* under circumstances which would make the use of it, for any purpose inconsistent with that agreement, dishonest and fraudulent." ^{a 1}

Again, evidence may be given of a verbal agreement collateral to the contract proved. A term thus introduced into the written agreement must not be contrary to its tenor. A farmer executed a lease upon the promise of the lessor that the game upon the land should be killed down; he was held entitled to compensation for damage done to his crops by a breach of the verbal promise, though no reference to it appeared in the terms of the lease.

Mellish, L.J., in giving judgment said:

"No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement: but, nevertheless what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself." ^{b 2}

350. Explanation of terms. Evidence in explanation of terms may be evidence of the identity of the parties to the contract, as where two persons have the same name, or where an agent con-

^a *Jervis v. Berridge*, (1873) 8 Ch. 351.

^b *Erskine v. Adeane*, (1873) 8 Ch. at p. 766.

¹ *Wood v. Moriarty*, (1887) 15 R.I. 518; *Chapin v. Dobson*, (1879) 78 N.Y. 74; *Wood Mowing &c. Co. v. Gaertner*, (1885) 55 Mich. 453; *Bradshaw v. Combs*, (1882) 102 Ill. 428.

² *Thurston v. Arnold*, (1876) 43 Iowa, 43; *Chapin v. Dobson*, (1879) 78 N.Y. 74; *Naumberg v. Young*, (1882) 44 N.J. L. 331; *Green v. Batson*, (1888) 71 Wis. 54; *Bretto v. Levine*, (1892) 50 Minn. 168.

tracts in his own name but on behalf of a principal whose name or whose existence he does not disclose."^{a 1}

Or it may be a description of the subject-matter of the contract. *A* agreed to buy of *X* certain wool which was described as "your wool"; the right of *X* to bring evidence as to the quality and quantity of the wool was disputed. The court held that the evidence was admissible.^{b 2}

Or such evidence may be an explanation of some word not describing the subject-matter of the contract but the nature of the responsibility which one of the parties assumes in respect of the conditions of the contract. Where a vessel is warranted "seaworthy," a house promised to be kept in "tenantable" repair, a thing undertaken to be done in a "reasonable" manner, evidence is admissible to show the application of these phrases to the subject-matter of the contract, so as to ascertain the intention of the parties.³

In *Burges v. Wickham*,^c a vessel called the *Ganges*, intended for river navigation upon the Indus, was sent upon the ocean voyage to India, temporarily strengthened so as to be fit to meet the perils of such a voyage. She was insured, and in every policy of marine insurance there is an implied warranty by the insured that the vessel is "seaworthy." The *Ganges* was not seaworthy in the sense in which that term was usually applied to an ocean-going vessel, but the underwriters knew the nature of the vessel, and though the adventure was necessarily more dangerous than the voyage of an ordinary vessel, she was made as seaworthy as a vessel of her type could reasonably be made. The underwriters took the risk at a higher premium than usual, and in full knowledge of the facts. The *Ganges* was lost, and the owner sued the underwriters; they defended the action on the ground that the vessel was unseaworthy for the purposes of an ocean voyage, and they resisted the admission of evidence to show that, with reference to this particular vessel and voyage, "sea-

^a *Wake v. Harrop*, (1861) 6 H. & N. 768.

^b *Macdonald v. Longbottom*, (1859) 1 E. & E. 977.

^c (1863) 3 B. & S. 669.

¹ *Andrews v. Dyer*, (1888) 81 Me. 104; *Barbre v. Goodale*, (1896) 28 Ore. 465; *Byington v. Simpson*, (1883) 134 Mass. 169.

² *Pfeifer v. Ins. Co.*, (1895) 62 Minn. 536; *Cooper v. Potts*, (1898) 185 Pa. 115; *Waldheim v. Miller*, (1897) 97 Wis. 300. Cf. *Trustees v. Jessup*, (1903) 173 N.Y. 84.

³ *Ganson v. Madigan*, (1862) 15 Wis. 144; *Manchester Paper Co. v. Moore*, (1887) 104 N.Y. 680; *Maynard v. Render*, (1894) 95 Ga. 652. If the parties have used the term in different senses, the contract is voidable for mistake. *Hasard v. New England Marine Ins. Co.*, (1832, U.S.C.C.) 1 Sumner, 218.

worthiness" was understood in a modified sense. The evidence was held to be admissible on grounds which are stated with the utmost clearness by Blackburn, J.:

"It is always permitted to give extrinsic evidence to apply a written contract, and show what was the subject-matter to which it refers. When the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, *sed secundum quid*, the extent of the obligation cast upon the party may vary greatly according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract. For example, in a demise of a house with a covenant to keep it in tenantable repair, it is legitimate to inquire whether the house be an old one in St. Giles's or a new palace in Grosvenor-square, for the purpose of ascertaining whether the tenant has complied with his covenant; for that which would be repair in a house of the one class is not so when applied to a house of the other [see *Payne v. Haine*, (1847) 16 M. & W. 541].

"In these cases you legitimately inquire what is the subject-matter of the contract, and then the terms of the stipulation are to be understood, not *simpliciter*, but *secundum quid*. Now, according to the view already expressed, seaworthiness is a term relative to the nature of the adventure; it is to be understood, not *simpliciter*, but *secundum quid*." ^a

Cases such as we have just described are cases of *latent* ambiguity: and they must be carefully distinguished from *patent* ambiguities, where words are omitted, or contradict one another; for in such cases explanatory evidence is not admissible. Where a bill of exchange was expressed in words to be drawn for "two hundred pounds" but in figures for "£245," evidence was not admitted to show that the figures expressed the intention of the parties. ^{b 1}

351. Proof of usage. The usage of a trade or of a locality may be proved, and by such evidence a term may be annexed to a written contract, or a special meaning may be attached to some of its provisions.

Parol evidence of a usage which adds a term to a written contract is admissible on the principle that —

"There is a presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages." ^c

^a *Burges v. Wickham*, (1863) 3 B. & S. 696.

^b *Saunderson v. Piper*, (1839) 5 Bing. (N.C.) 425. Note that now by the Bills of Exchange Act, 1882, § 9 (2), where the words and the figures differ in a bill of exchange, the former are declared to prevail.

^c *Hutton v. Warren*, (1836) 1 M. & W. 466.

¹ See *Lessing v. James*, (1895) 107 Cal. 348.

By way of illustration of a commercial usage we may take the warranty of seaworthiness which is always held to be included in a voyage policy of marine insurance, though not specially mentioned.

For a local usage we may take the right of a tenant quitting his farm at Candlemas or Christmas to reap corn sown in the preceding autumn, a right which the custom of the country annexed to his lease, though the lease was under seal and contained no such term.^{a 1}

Parol evidence of usage to explain phrases in contracts, whether commercial, agricultural, or otherwise subject to known customs, is admissible on the principle that —

“Words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language.”^b

Thus in the case of a charter-party in which the days allowed for unloading the ship are to commence running “on arrival” at the ship’s port of discharge, if by custom “arrival” is understood to mean arriving at a particular spot in the port, evidence may be given to show what is commonly understood by “arrival at” the port.^{c 2}

And so where the lessee of a rabbit warren covenanted that he would leave 10,000 rabbits on the warren, parol evidence was admitted that, by local custom, 1000 meant 1200.^{d 3}

Closely connected with the principle that usage may explain phrases is the admissibility of skilled evidence to explain terms of art or technical phrases when used in documents.^{e 4}

But in order that a usage thus proved may enlarge or explain a contract it must satisfy two requirements. It must be reasonable and consistent with general rules of law, and it must not be inconsistent with the terms of the contract. For no usage can

^a *Wigglesworth v. Dallison*, (1779) 1 Sm. L.C. (11th ed.) 545.

^b *Brown v. Byrne*, (1854) 3 E. & B. 716.

^c *Norden Steam Co. v. Dempsey*, (1876) 1 C.P.D. 658.

^d *Smith v. Wilson*, (1832) 3 B. & Ad. 728. ^e *Hills v. Evans*, (1862) 31 L.J. Ch. 457.

¹ *Cooper v. Kane*, (1838, N.Y.) 19 Wend. 386 (local custom that excavator was entitled to sand); *Kilgore v. Bulkley*, (1841) 14 Conn. 362; *Richlands & Co. v. Hiltbeitel*, (1895) 92 Va. 91.

² *Hearn v. Ins. Co.*, (1870, U.S.) 3 Cliff. 318.

³ *Soutier v. Kellerman*, (1853) 18 Mo. 509; *Leavitt v. Kennicott*, (1895) 157 Ill. 235; *Higgins v. Cal. & Co.*, (1898) 120 Cal. 629. See *Walls v. Bailey*, (1872) 49 N.Y. 464; *Eaton v. Gladwall*, (1896) 108 Mich. 678.

⁴ *Welsh v. Huckestein*, (1892) 152 Pa. 27; *Louisville & Co. R. v. R. Co.*, (1898) 174 Ill. 448; *Cargill v. Thompson*, (1894) 57 Minn. 534.

prevail against a rule of common law or statute; ^a and it is open to parties to exclude the usage either by express terms or by framing their contract so as to be repugnant to its operation.^{b 1}

A usage must in any case, it is clear, add something to the written contract, and in that sense does vary it. The true test whether it is inconsistent with, or repugnant to, what is written is to be found by asking the question whether what is added by the usage "is such as *if expressed in the contract* would make it insensible or inconsistent."^c

352. Extrinsic evidence in equity. In the application of equitable remedies, and granting or refusal of specific performance, the rectification of documents or their cancellation, extrinsic evidence is more freely admitted.

Thus, though, as we have seen, a man is ordinarily bound by the terms of an offer unequivocally expressed, and accepted, evidence has been admitted to show that the offer was made by inadvertence and was not accepted in good faith. The case of *Webster v. Cecil* ^d is here in point. A offered to X several plots of land for a round sum; immediately after he had despatched his offer he discovered that by a mistake in adding up the prices of the plots he had offered his land for a lower total sum than he intended. He informed X of the mistake without delay, but not before X had concluded the contract by acceptance. In resisting specific performance he was permitted to prove the circumstances under which his offer had been made.²

Again, where a parol contract has been reduced to writing, or where a contract for a lease or sale of lands has been performed by the execution of a lease or conveyance, evidence may be admitted to show that a term of the contract is not the real agreement of the parties. And this is done for two purposes and under two sets of circumstances.

Where a contract has been reduced into writing, or a deed executed, in pursuance of a previous engagement, and the writing

^a Nevertheless the usage of a society to compel its members to carry out contracts avoided by statute may constitute a risk against which the person employed to make such contracts is indemnified by his employer, where both know of the usage. *Supra*, § 265.

^b Per Erie, C.J., in *Meyer v. Dresser*, (1864) 16 C.B. (N.S.) 660.

^c Lord Campbell in *Humfrey v. Dale*, (1867) 7 E. & B. 275.

^d (1861) 30 Beav. 62. *Ante*, § 193.

¹ *The Schooner Reeside*, (1837, U.S.) 2 Sumner, 567.

² Unilateral mistake working a hardship upon the mistaken party may lead an equity court to refuse specific performance, though it is not a ground for rescission. *Chute v. Quincy*, (1892) 156 Mass. 189; *Mansfield v. Sherman*, (1889) 81 Me. 365.

or deed, owing to mutual mistake, fails to express the intention of the parties, the Chancery Division will rectify the written instrument in accordance with their true intent.¹ This may be done even though the parties can no longer be restored to the position which they occupied at the time when the contract was made.^a Should the original agreement be ambiguous in its terms, extrinsic, and, if necessary, parol evidence will be admitted to ascertain the true intent of the parties.^b

But there must have been a genuine agreement: ^c its terms must have been expressed under *mutual* mistake: ^d and the oral evidence, if the only evidence, must be uncontradicted.^e

Where mistake is not mutual, extrinsic evidence is only admitted in certain cases which appear to be regarded as having something of the character of fraud, and is admitted for the purpose of offering to the party seeking to profit by the mistake an option of abiding by a corrected contract or having the contract annulled.^f Instances of such cases are *Garrard v. Frankel*,^g or *Page v. Marshall*^h cited in the chapter on Mistake. They are cases in which the offeree knows that an offer is made to him in terms which convey more than the offeror means to convey, and endeavors by a prompt acceptance to take advantage of the mistake.ⁱ

It would seem that, in such cases, these corrective powers are not used unless the parties can be placed in the same position as if the contract had not been made.

The Judicature Act ^j reserves to the Chancery Division of the High Court a jurisdiction in "all causes for the rectification or setting aside or cancellation of deeds or other written instruments."

^a *Earl Beauchamp v. Winn*, (1873) L.R. 6 H.L. at p. 232.

^b *Murray v. Parker*, (1854) 19 Beav. 305.

^c *Mackenzie v. Couleoun*, (1869) 8 Eq. 375.

^d *Fowler v. Fowler*, (1859) 4 D. & J. 250.

^e See Pollock (7th ed.), 494-96.

^f (1894) 28 Ch. D. 255.

^g *Ante*, § 193.

^h (1862) 30 Beav. 445.

ⁱ 36 & 37 Vict. c. 66, § 34.

¹ *Cole v. Fickett*, (1901) 95 Me. 265; Ames' Cases in Equity Jurisd., vol. ii, pp. 178-82, note.

² *Purvines v. Harrison*, (1894) 151 Ill. 219; *Southard v. Curley*, (1892) 134 N.Y. 148.

³ See *Shelton v. Ellis*, (1883) 70 Ga. 297; *Lawrence v. Staigg*, (1866) 8 R.I. 256; *Brown v. Lamphear*, (1862) 35 Vt. 252. Cf. *Moffett Co. v. Rochester*, (1897) 82 Fed. 255; *Smith v. Mackin*, (1871, N.Y.) 4 Lans. 41.

CHAPTER XIII

Interpretation and Construction in the Law of Contract

353. **Introductory.**¹ The law of contract deals with those legal relations that arise because of mutual expressions of assent. The parties have expressed their intentions in words, or in other conduct that can be translated into words. The notion is not at all uncommon that legal relations called *contractual* cannot exist unless the parties *intended* them to exist, and that the sole function of the courts, therefore, is one of interpretation only. What was the intention of the parties? This notion is far from correct. In almost all cases of contract, legal relations will exist from the very moment of acceptance that one or both of the parties never consciously expected would exist, and therefore cannot be said to have intended. Furthermore, the life history of any single contract may cover a long period of time, and new facts will occur after acceptance of the offer — facts that may gravely affect the existing legal relations and yet may have been utterly unforeseen by the parties. Many of these un contemplated legal relations are invariably described as contractual. Therefore it appears that a necessary function of the courts is to determine the unintended legal relations as well as the intended ones.²

The first step in this judicial process is the merely historical one of determining what the operative facts were. What did the parties say and do? What words did they use? Did they execute a document? This historical determination is made possible by *evidence*, and one chapter has therefore been devoted to rules of evidence.

¹ This section is by the American editor.

² In *Becker v. London Assur. Corp.* (1918, H. of L.) 117 L.T. 609, construing an insurance contract, Lord Sumner said: "I dare say few assured have any distinct view of their own on the point, and might not even see it, if it were explained to them, but what they intend contractually does not depend on what they understand individually. If it is implicit in the nature of the bargain, then they intend it in law just as much as if they said it in words."

This applies to rights and duties as well as to conditions. There are "implied" promises as well as "implied" conditions, and although the implication is often one of fact, there are many cases where it is obvious fiction. In the latter cases the promise and the condition are purely *con-*

The next step is one of interpretation. What was the meaning and intention of the parties? What ideas did the parties intend to convey by their words and acts? The law gives us very great liberty of contract, and if it appears that certain legal relations were intended by the parties under the circumstances actually existing, their intention will generally be made effective.

Often, however, the court cannot solve the problem before it by mere interpretation of words. It is then necessary to resort to general rules of law even though they were unknown to the parties, to fairness and morality, to the prevailing *mores* of the time and place. This process may be called one of judicial construction. The line separating mere interpretation from judicial construction, although logically quite clear, will always be practically indistinct and difficult of determination, especially because the courts so frequently construct under the guise of mere interpretation.

Questions of interpretation and construction continually arise in dealing with the subject of breach of contract. The existence and legal effect of any breach are determined by the processes of interpretation and construction, and it is in the subsequent chapter under that heading that most of the rules will be found and their applications discussed. At the cost of some duplication, there has been inserted in the present chapter an analytical discussion of "conditions."

1. *The interpretation of words*

354. General rules. We have so far considered the mode in which the terms of a contract are ascertained: we have now to deal with the rules which govern the construction of those terms, premising that the construction of a contract is always a matter of law for the court to determine.

(1) Words are to be understood in their plain and literal meaning. This rule may lead to consequences which the parties did not contemplate, but it is followed, subject always to admissible evidence being adduced of a usage varying the usual meaning of the words.^{a 1}

^a *Mallan v. May*, (1843) 13 M. & W. 517.

structive. For reasons of supposed public welfare the courts determine the operative effect of the existing facts in these cases without reference to intention of the parties, freely constructing or defeating rights and duties, powers, privileges, and other legal relations.

¹ For an illuminating discussion of this rule, see *Wigmore on Evidence*, § 2462.

(2) "An agreement ought to receive that construction which will best effectuate the intention of the parties to be collected *from the whole of the agreement*"; "greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent."^a

Rules (1) and (2) might seem to be in conflict, but they come substantially to this: men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear. The courts will not make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words.¹ Subsidiary to these main rules there are various others, all tending to the same end, the effecting of the intention of the parties so far as it can be discerned.

Obvious mistakes in writing and grammar will be corrected by the court.

The meaning of general words may be narrowed and restrained by specific and particular descriptions of the subject-matter to which they are to apply.

Words susceptible of two meanings receive that which will make the instrument valid. Where a document was expressed to be given to the plaintiffs "in consideration of your *being* in advance" to J. S., it was argued that this showed a past consideration; but the court held that the words might mean a prospective advance, and be equivalent to "in consideration of your *becoming* in advance," or "*on condition* of your being in advance."^{b 2}

Words are construed most strongly against the party using them. The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a

^a *Ford v. Beech*, (1848) 11 Q.B. 866.

^b *Haigh v. Brooks*, (1839) 10 A. & E. 309.

¹ *Reed v. Ins. Co.*, (1877) 95 U.S. 23; *Hamill Co. v. Woods*, (1895) 94 Iowa, 246; *Thorington v. Smith*, (1868, U.S.) 8 Wall. 1; *Higgins v. Cal. &c. Co.*, (1898) 120 Cal. 629.

² *Halliday v. Hess*, (1893) 147 Ill. 588; *Bodman v. Am. Tract Society*, (1864, Mass.) 9 Allen, 447; *Sargent v. Adams*, (1854, Mass.) 3 Gray, 72.

construction by which they would mean another thing, more to his advantage.^{a 1}

2. *The character and determination of conditions*²

355. **The nature of a right.** One of the chief purposes for which parties make an executory contract is the creation of *rights* and *duties*. A right is the logical correlative of a duty; the one cannot exist without the other, and neither can exist at all unless there are two individuals living within some organized society.³ If for the benefit of *A* society commands certain conduct or performance on the part of *B* and will take some action detrimental to *B* in case of disobedience, we say that *A* has a right and *B* has a duty. *Right* requires performance by another; *duty* requires performance by its possessor.

356. **Conditions are operative facts.** Society may not command *B* to perform immediately, however; nor may its command be absolute and unconditional. Thus, if for value received *B* promises *A* to pay him \$100 one year after date, the law recognizes the existence of a right in *A* and a duty in *B*, but will take no steps by way of enforcement until the date of maturity. A duty rests on *B*, but the performance that it requires is not to take place until the end of the year. *B*'s promise is said

^a *Fowkes v. Manchester Assur. Ass'n*, (1863) 3 B. & S. 929.

¹ Words in an insurance policy are to be interpreted most strongly against the insurer, where two constructions are possible. *Liverpool L. & G. Co. v. Kearney*, (1901) 180 U.S. 132. It seems obvious that the purpose of this rule is not to carry out the intention of the party but is to do justice by mitigating harsh contracts. A similar rule existed in the Roman law, the reason given being "*quia stipulatori liberum fuit verba late concipere*." Digest, Book 45, Tit. 1, § 99; Book 2, Tit. 14, § 39. For the principles governing construction of documents, see Wigmore on Evidence, §§ 2458-2478.

² All of the text under this heading, including sections 355-373, is by the American editor.

³ It is not uncommon for writers to describe certain rights as "absolute" rights; but any so-called "absolute" right will be found on analysis to consist of a multitude of rights against a multitude of persons, each of whom is under a correlative duty. These rights have been aptly described by Professor W. N. Hohfeld as "multital" rights, as opposed to "unital" rights and "paucital" rights. See "Fundamental Legal Conceptions," 26 *Yale Law Journal*, 710. It is not uncommon to speak of "inherent" rights and "natural" rights, some even claiming "divine" rights; but these terms are used only by those whose historical perspective is insufficient to enable them to perceive that all such rights are dependent on the prevailing *mores* of society, changing as the *mores* change in the onward course of our evolutionary development. See William G. Sumner, (1906) *Folkways*; A. G. Keller, (1915) *Societal Evolution*; Justice O. W. Holmes, "Natural Law," (1918) 32 *Harvard Law Review*, 40.

to be unconditional, although his duty is in fact conditional upon the passage of a year's time — a condition whose non-fulfillment is not conceivable by the human mind and one which is therefore disregarded in describing the promise and the duty.

Suppose, however, that *B* promises to pay the \$100 *after his ship comes in*. Here the promise is a conditional promise, and it is not at all certain that the condition (the coming in of the ship) will be fulfilled. It may be argued that until this operative fact called a condition comes into existence there is no right and no duty whatever. It is true that prior to its existence there will be no legal penalty for non-action. But prior to its existence legal relations exist, and they are commonly called conditional rights and conditional duties as opposed to instantly enforceable rights and immediately active duties. No absolute necessity is seen for proposing new descriptive terms; but there is great necessity of understanding the character of the legal relations before and after the fulfillment of the condition. If the conditioning fact is an *act* of one of the parties he may properly be said to have a *power* to create instant rights and duties by doing the act, and the other party is under a correlative *liability*. But many conditioning facts are not acts of either party, and neither party has a power. If the condition is a voluntary act of some third person, it is he who has the *power* to turn the conditional right into an immediately enforceable one.¹ If the condition is an event of nature other than a human act, no person is possessed of a legal *power*.

The word "condition" is used in the law of property as well as in the law of contract and it is used with some variation in meaning. In the law of contract it is sometimes used in a very loose sense as synonymous with "term," "provision," or "clause." In such a sense it performs no useful service. In its proper sense the word "condition" means some operative fact subsequent to acceptance and prior to discharge, a fact that affects the rights and duties of the parties. Such a fact may be an act of one of the two contracting parties, an act of a third party, or any other fact of our physical world. It may be a performance that has been promised or a fact as to which there is no promise.

It will be observed that any *operative* fact may properly be said to be a cause or condition of the legal relations that are consequent thereon. This does not mean that these legal rela-

¹ See *Pym v. Campbell*, (1856) 6 E. & B. 371, discussed *ante*, § 346.

tions will infallibly follow the existence of this fact irrespective of its combination with other antecedent facts; but it does mean that with the same combination of antecedent facts the same legal relations will infallibly result. An offer is a cause (or condition) of the power in the offeree. An acceptance is a cause (or condition) of contractual rights and duties. Nevertheless in contract law it is not common to speak of these facts as conditions, although such usage is not unknown. The term condition is restricted to facts subsequent to acceptance and prior to discharge.

357. **Express, implied, and constructive conditions.** A certain fact may operate as a condition, because the parties intended that it should and said so in words. It is then an *express* condition. It may operate as a condition because the parties intended that it should, such intention being reasonably inferable from conduct other than words. It is then a condition *implied in fact*. Lastly, it may operate as a condition because the court believes that the parties would have intended it to operate as such if they had thought about it at all, or because the court believes that by reason of the *mores* of the time justice requires that it should so operate. It may then be described as a condition *implied by law*, or better a *constructive condition*.¹

358. **Promise and condition distinguished.** Observe that an express or an implied condition is not the same thing as an express or an implied promise. Thus, in *Constable v. Cloberie* ²

¹ "Supposing a contract to have been duly formed, what is its result? An obligation has been created between the contracting parties, by which rights are conferred upon the one and duties are imposed upon the other, partly stipulated for in the agreement, but partly also implied by law, which, as Bentham observes (Works III, 190) 'has thus in every country supplied the shortsightedness of individuals, by doing for them what they would have done for themselves, if their imagination had anticipated the march of nature.'" Holland, *Juris*. (10th ed.), p. 278. In *Leonard v. Dyer*, (1857) 26 Conn. 172, 178, the court said: "And if we were to add stipulations to the contract which the parties themselves did not make, it appears to us that such only should be inferred as the parties themselves would have made, had they foreseen the circumstances that rendered such stipulations important." See also *Banks, L.J.*, in *Grove v. Webb*, (1916) 114 L.T. 1082, 1089.

"You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions." Justice O. W. Holmes, "The Path of the Law," 10 *Harvard Law Review*, 466.

² (1626) Palmer, 397; s.c. Latch, 12, 49; s.c. Popham, 161.

there was a bilateral contract in which the plaintiff expressly promised to sail with the next favoring wind and the defendant promised to pay a certain sum if the ship made the voyage to Cadiz and returned to the Downs. Sailing with the next wind was a performance that was expressly promised, but it was not a *condition* of the duty of the defendant to pay. Sailing with the next wind was an operative fact, for it would *discharge* a duty of the plaintiff; but it had no operative effect upon the defendant's duties or the plaintiff's rights. There was an express condition attached to the defendant's duty to pay, but that was making the voyage to Cadiz and return. The existence of this fact was not promised at all.

A promise is always an *act* of one of the parties to the contract, and its purpose is always to create a duty in the party making the promise. A condition may not be an act of anybody, although it frequently is an act of one of the parties; its effect is practically never the creation of a duty in the one acting but nearly always is the creation of a duty in another person. The non-fulfillment of a promise is called a breach of contract, and creates in the other party a secondary right to damages; it is the failure to perform that which was required by a previous duty. The non-fulfillment of a condition will prevent the existence of a duty in the other party, and it may not create any secondary duty at all.

The fulfillment of a condition may, however, be promised. If in *Constable v. Cloberie* the plaintiff had promised to make the voyage and return, we should have a case where the existence of the fact (voyage and return) is expressly promised by the plaintiff and is also a condition precedent to the instant duty of the defendant to pay. The non-performance would then have double operation, preventing any instant duty in the defendant to pay freight and creating a secondary duty in the plaintiff to pay damages. Such a condition might be described as a *promissory condition*.¹

¹ See *Home Ins. Co. v. Union Trust Co.*, (1917, R.I.) 100 Atl. 1010, holding that a certain proviso creates a condition, but is not a promise and creates no duty. Also *Coykendall v. Blackmer*, (1914, N.Y.) 161 App. Div. 11. For cases holding that the particular proviso is promissory and creates a duty and is not a mere condition, see *St. Paul F. & M.I. Co. v. Upton*, (1891) 2 N.D. 229; *Boston S.D. Co. v. Thomas*, (1898) 59 Kan. 470. Some cases indicate a great readiness to find a promise by mere inference or implication. *Dupont Powder Co. v. Schlottman*, (1914, C.C.A.) 218 Fed. 353; *Patterson v. Meyerhofer*, (1912) 204 N.Y. 96. Cf. *Clark v. Hovey*, (1914) 217 Mass. 485.

359. **Conditions precedent, concurrent, and subsequent.** All conditions are precedent to the legal relations that they operate to create, and they are always subsequent to the legal relations and other facts that preceded them. The terms precedent and subsequent express a relation in *time* between two facts, one of which is the legal relation itself, and before using any one of them it is necessary to determine just what two facts are being considered. In the case of *Constable v. Cloberie* above stated, making the voyage to Cadiz and return was a fact that was subsequent to the formation of the contract, subsequent to acceptance of the offer; but it was precedent to the existence of any instant duty in the defendant to pay, precedent also to any secondary right in the plaintiff to damages for non-payment.

A *condition precedent* is an operative fact that must exist prior to the existence of some legal relation in which we are interested. The particular relation most commonly in mind when this term is used is either the instant and unconditional duty of performance by a promisor or the secondary duty to pay damages for a breach of such duty of performance.¹

A *condition subsequent* is an operative fact that causes the termination of some previous legal relation in which we are interested. The term is used with reference to both primary contractual duties and secondary duties.²

Conditions concurrent are acts that the parties to a contract are under duties of performing concurrently, the act of each party being separately operative as a condition precedent. The

¹ The following are illustrations. I promise to pay such an amount as X may determine: *Thurnell v. Balbirnie*, (1837) 2 M. & W. 786; *Old Colony Ry. v. Brockton Ry.*, (1914) 218 Mass. 84; *Scott v. Avery*, (1856) 5 H. L. Cas. 811. I promise to pay as soon as I am able: *Work v. Beach*, (1891, Sup. Ct.) 13 N.Y. Supp. 678. See also Ulpian, Digest, Bk. 2, Tit. 14, Par. 49. I promise to pay after architect X has certified that the work is properly done: *Clarke v. Watson*, (1865) 18 C.B. (N.S.) 278; *Granger Co. v. Brown-Ketcham Iron Works*, (1912) 204 N.Y. 218. Cf. *Nolan v. Whitney*, (1882) 88 N.Y. 648.

In these cases the determination by X, the financial ability, and the architect's certificate are facts that operate as conditions precedent to the legal duty to pay.

² Examples of conditions subsequent to the secondary obligation and terminating it are to be found in *Semmes v. Hartford Ins. Co.*, (1871, U.S.) 13 Wall. 158; *Chambers v. Atlas Ins. Co.*, (1883) 51 Conn. 17; *Read v. Insurance Co.*, (1897) 103 Iowa, 307; *Ward v. Warren*, (1903) 44 Or. 102; *Smart v. Hyde*, (1841) 8 M. & W. 723. For instances of a condition subsequent to the primary obligation, its non-fulfillment being a condition precedent to the secondary obligation, see *Gray v. Gardner*, (1821) 17 Mass. 188; *Moody v. Ins. Co.*, (1894) 52 Ohio St. 12.

act is not concurrent with the legal relation affected, but only with the act of the other party.¹

The practice is almost universal of using these terms to describe the legal operation of some fact without mentioning or even clearly considering the particular legal relation to which the first is being related in time. The result is most distressing; for it leaves the reader confused and doubtful and it is a cause of conflict in decision, uncertainty of law, and actual injustice. In one case a fact will be called a condition precedent and in another case the same fact (or its non-existence) will be called a condition subsequent, because in the first case it is being subconsciously related to the legal relations that follow it and in the other case to the legal relations that preceded it.² It has been supposed that by the use of the terms precedent and subsequent it can be determined which party bears the burden of proof and the burden of alleging the existence of the fact. This will now be considered.

360. Burden of alleging and proving operative facts. The problem of pleading is not at all identical with the problem of proof by means of evidence, but for our present purpose they may be discussed together. The plaintiff must state in his declaration all facts necessary to make out a "cause of action," and if his statements are traversed he must later prove them by a preponderance of testimony. What then is a "cause of action" in contract cases? In *assumpsit* for damages this includes the formation of a valid contract and a breach thereof by the defendant, a primary obligation and a secondary obligation. The primary obligation consists of those legal relations arising at the time of acceptance; the secondary obligation consists of those arising at the time of breach. There can be no breach until an active primary duty exists. It would seem, therefore, that the plaintiff would have to allege and prove every fact that is a con-

¹ Payment and conveyance in sales of land: *Sherman v. Leveret*, (1790, Conn.) 1 Root, 169; *Beecher v. Conradt*, (1855) 13 N.Y. 108; *Goodisson v. Nunn*, (1792) 4 T.R. 761; *Green v. Reynolds*, (1807, N.Y.) 2 Johns. 206.

Payment and delivery in sales of goods: *Morton v. Lamb*, (1797) 7 T.R. 125; *Brown v. Rushton*, (1916) 223 Mass. 80; *Diem v. Koblitz*, (1892) 49 Ohio St. 41.

² That the confusion between conditions precedent and conditions subsequent is both ancient and respectable, in property law as well as in contract law, witness 2 Coke's Inst., ch. 27, 11: "Many are of opinion against Littleton in this case . . . and that here Littleton of a condition precedent doth make it subsequent." Coke states the arguments *pro* and *con*, and then adds: "*Benigne lector, utere tuo iudicio, nihil enim impedit.*"

dition precedent to the existence of this primary duty and of the secondary duty arising from its breach and of his own correlative primary and secondary rights. Some of these facts are precedent to the primary duty; others are subsequent thereto but are precedent to the secondary duty.¹

But a "cause of action" must exist at the time of bringing suit. It is not enough that a breach occurred, giving rise to a secondary duty to pay damages. That secondary duty must have continued existence. After the birth of such a secondary duty many new facts may occur prior to bringing suit that will destroy it. These operative facts are subsequent to the birth of the secondary duty but their non-existence is a condition precedent to the plaintiff's right to a judgment. It might seem therefore that the plaintiff must affirmatively allege every fact necessary to the existence of the primary duty, to the birth of the secondary duty, and to the continued existence of the secondary duty down to the time of suit,² and bear the burden of proving his allegations. Such, however, is not the case as to many of these operative facts. No primary legal duty will exist if the parties made the contract with an unlawful purpose, and yet the plaintiff is not required either to allege or to prove the absence of such a purpose. The defendant is no longer under his primary duty if he has repudiated the contract for the fraud of the plaintiff, and yet the plaintiff need not allege the absence of fraud and of dis-

¹ The burden of proving a fact is always thrown upon the plaintiff whenever the court declares that fact to be a condition precedent. Also the complaint is demurrable if the fulfillment of such a condition is not alleged. *Worsley v. Wood*, (1796) 6 T.R. 710; *Newton Rubber Works v. Graham*, (1898) 171 Mass. 352; *Colt v. Miller*, (1852, Mass.) 10 Cush. 49. See Ames' *Cases Pleading*, 307, citing many cases. Frequently the ruling as to the burden of proof will be decisive of the whole case because of the lack of evidence. Thus, where an insurance policy provided for payment to the wife of the insured, if living, otherwise to the estate of the insured, and both husband and wife went down with the *Lusitania*, the administrator of the wife failed to recover because he could not prove that the husband died first. *McGowin v. Menken*, (1918) 223 N.Y. 509, 119 N.E. 877. It should be observed that the husband's not dying first is equally a condition precedent to the right of his administrator.

² When a particular state of affairs is once shown to exist, the law will assume its continued existence and throws upon the party alleging a new operative fact changing that state of affairs the burden of proving the new fact. So the legal relations composing a primary obligation will be assumed to continue, as will also those composing a secondary obligation arising from breach of contract. Since a "cause of action" consists of a secondary as well as a primary obligation, one might suppose the plaintiff would have the burden of proving all the facts necessary to both. It appears, however, that this is not the case.

affirmance. There are numerous ways in which a primary duty can be discharged before breach and in which a secondary duty can be discharged afterwards, but the burden of allegation and proof is often thrown on the defendant. Such facts are described as affirmative defenses.¹

Thus it is evident, in spite of very general assumptions to the contrary, that the burden of allegation and the burden of proof cannot be determined by the test of such descriptive adjectives as precedent and subsequent. It is no doubt true that the law on this subject needs entire reconstruction and restatement, that there is no existing test capable of logical definition, and that the rules are largely arbitrary as well as conflicting. Such rules as now exist will frequently be found to be based on false logic and on more or less ill-defined notions of public policy.²

361. Conditions in unilateral contracts. A unilateral contract is one where only one of the parties assumes a contractual duty and only the other acquires any contractual right; as, for example, where *A* sells and delivers a chattel to *B* on credit. In such a case full performance by *A* is a condition precedent to the existence of any primary duty in *B*.³ There may, however, be further conditions, both intentional (i.e., express and implied in fact) and constructive, precedent to *B*'s instant and unconditional duty to pay the price or to his secondary duty to pay damages for breach. *B*'s promise might be expressly conditional, e.g., *B* is to pay "if his ship comes in." If *B* promised to pay in his own personal labor, his duty would be constructively conditional on his continued life and health.

¹ Whenever a court describes a fact as a condition *precedent* it invariably throws the burden of proof upon the plaintiff. When the court wishes to throw the burden of proving the fact upon the defendant it will frequently bring this about by describing the fact as a condition *subsequent*. Thus, it is often provided in insurance policies that the contract is to be "void" in a certain event that may or may not happen; the burden of proving the occurrence of the event is nearly always put upon the defendant company. The occurrence of the event is indeed subsequent to the primary obligation, but its non-occurrence is a condition precedent to any *active* duty of the defendant to pay, either primary or secondary. See *Benanti v. Delaware Ins. Co.*, (1912) 86 Conn. 15; *Marcovitch v. Liverpool V.F. Soc.*, (1912, C.A.) 28 T.L.R. 188; *Moody v. Ins. Co.*, (1894) 52 Ohio St. 12; *Murray v. New York Life Ins. Co.*, (1881) 85 N.Y. 236; *Bowers v. Great Eastern Cas. Co.*, (1918, Pa.) 103 Atl. 536. See further *Ames' Cases on Pleading*, 302-06, citing more than 100 cases.

² For a very excellent discussion of principles involved, see the dissenting opinion of Chief Justice Doe in *Kendall v. Brownson*, (1866) 47 N.H. 186, 196.

³ Not necessarily precedent, however, to an irrevocable power of acceptance. See *ante*, § 50 and note.

362. Conditions in bilateral contracts. In this case each party assumes either an instant duty or a conditional duty or an irrevocable liability to such a duty. Both the instant duty of *B* to perform and also his secondary duty to pay damages may be either expressly or constructively conditional on *A*'s performance or on other facts. If it is conditional on *A*'s performance or tender thereof, *B*'s promise is said to be *dependent*. If it is not so conditional, *B*'s promise is said to be *independent*. If the performances of the two parties are required to be concurrent in time and the secondary duty of each is conditional upon a prior tender of performance by the other, both promises are dependent and the conditions are said to be concurrent. This will be further discussed hereafter in dealing with the effect of breach of contract.

363. Non-fulfillment of a condition. By "non-fulfillment" is here meant the non-existence of the operative fact described as a condition. This must be sharply distinguished from the non-performance of a thing promised, although the performance that is promised may also be operative as a condition. So long as the condition remains unfulfilled, the expected legal relation (e.g., the primary duty to perform or the secondary duty to pay damages) does not exist. If, however, the time for the fulfillment of the conditions has not yet expired, the previous legal relations remain unaffected. Suppose that *A* has made a conditional promise to convey Blackacre to *B*, the condition being that *B* shall tender \$1000 to *A* within one year. A tender of the money at any time during the year will turn *A*'s liability (or conditional duty) into an instant duty; during the entire year there remains the possibility that the condition will be fulfilled. At the expiration of the year, however, no such possibility remains, and *A*'s previous liability (or conditional duty) is now terminated. Suppose further that the consideration for *A*'s conditional promise to convey was a return promise of *B* to pay \$1000 within one year independently of conveyance by *A*. Now the tender of payment is an act that *B*'s duty requires as well as a condition precedent to *A*'s instant duty to convey. Failure to tender within the year is now a breach of duty as well as the non-fulfillment of a condition; it creates in *B* a secondary duty to pay damages in addition to terminating *A*'s liability (or conditional duty) to convey. In this case, however, the *contract* should not be said to be discharged as a whole, because *A* still has his right to full payment — a right specifically enforceable in equity.

This is discussed further in the following chapter dealing with the effect of breach.

Where the fact that operates as a condition was not agreed upon as such, either expressly or impliedly, by the parties, but is a condition by construction of law, the non-fulfillment of the condition has sometimes been described as an "equitable defense." At the very best, this term "defense" is analytically misleading. In the absence of the operative fact there never was a cause of action. The question here is not as to which party shall prove the facts, but as to the operative effect of the facts after being proved. The word "equitable" is equally undesirable. It renders accurate historical (not analytical) service in one instance only, and that is in a case where the fact in question was held to operate as a condition in the court of chancery only, and not in the courts of common law, of admiralty, of the merchants, of the manors, of the cities, and of the church. In cases of this sort the will of the chancellor eventually became paramount and his procedure became effective so as practically to nullify the rules of the other courts. Thereafter the non-fulfillment of an "equitable" condition meant that the contemplated legal relation did not exist, that the plaintiff had no right and that the defendant was under no duty. In the present state of our legal system it is no longer necessary or desirable to make use of the word "equitable" to describe the legal effect of a fact that operates as a constructive condition. Such a fact is a constructive condition in all courts alike, and its existence or non-existence has the same operative legal effect in all courts alike. There is conflict, indeed, in determining whether or not a certain fact should operate as a condition; but this is no longer a conflict between the King's Bench and the Chancery, it is a conflict between Judge A and Judge B.

364. **The recognition and determination of conditions.** Every one knows that the "construction" of a contract is one of the most difficult problems known to the law. What is the operative legal effect of facts occurring subsequently to acceptance of an offer? In answering this question in individual cases jurists have constructed various rules; and such as they are they will be discussed, in the main, in the succeeding chapters. Too often they are expressed in terms of mere verbal interpretation, the general dogma being avowed that "the law cannot make contracts for the parties." They are nearly always expressed in terms of logical exactitude, nursing that "illusion of certainty"

to which Mr. Justice Oliver Wendell Holmes has frequently referred. Candor compels the admission that logic is not the decisive factor and that certainty and uniformity do not exist even within the limits of a single jurisdiction.¹

The existence of an *express* condition is, indeed, to be determined in accordance with rules of verbal interpretation; but how easily and effectively can we read between the lines when the apparent condition seems to operate harshly and unfairly! We may calmly disregard it or we may openly nullify its operation on the ground that new facts, unforeseen by the parties, have occurred. No doubt, too, this is in accordance with our long established *mores*. The approval of the community is not obtained by insisting on the letter of the bond. Thus, where the promise was to pay a price after a named architect had given his certificate and not otherwise, the promisor has not infrequently been held in duty bound to pay even though no certificate has been given.² Likewise an express condition subsequent, providing that an existing right of action shall cease if the claimant fails to bring suit within a twelvemonth, has been openly set aside because the bringing of the suit was made very difficult by the breaking out of war.³ There are, to be sure, variations in the freedom with which courts set aside express conditions and we are sometimes reminded that the paramount public policy is that we must not lightly interfere with freedom of contract.⁴

If, as appears, courts very often feel free to set aside *express* conditions and to deprive facts of the legal effect that the parties expressly stated they should have, we need not be at all sur-

¹ The reply of the defendant in *Norrington v. Wright*, (1885) 115 U.S. 118, was justified by the state of the law. "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule, and its uncertainty of application."

² *Nolan v. Whitney*, (1882) 88 N.Y. 648. This case has been disapproved in Massachusetts. *Audette v. L'Union St. Joseph*, (1901) 178 Mass. 113. In England it would not be followed, but the condition is nullified if the certificate is withheld by collusion. *Batterbury v. Vyse*, (1863) 2 H. & C. 42.

³ *Semmes v. Hartford Ins. Co.*, (1871, U.S.) 13 Wall. 158. See also *Read v. Insurance Co.*, (1897) 103 Iowa, 307.

⁴ See *Tullis v. Jackson*, (1892) 3 Ch. 441, quoting Sir George Jessel. For a case giving full effect to an express condition even though it caused an extraordinary forfeiture and in spite of the fact that the non-fulfillment was due in part to erroneous action of the Court of Appeals itself, see *Evans v. Supreme Council*, (1918, N.Y.) 120 N.E. 93.

prised to find that they act much more freely in giving a legal effect to facts that the parties said nothing about, that is, in creating constructive conditions. Here, as elsewhere, judicial precedent plays an important part; but circumstances alter cases, and the circumstances vary so widely and so nearly universally that general rules become pitfalls. It is no doubt going too far to suggest that the only unvarying rule is that we must act as our neighbors believe that a just and reasonable man would act under the circumstances.

365. Waiver of conditions. It is well established that a condition precedent to a contract duty of immediate performance can be waived by a voluntary act of the party who is undertaking the duty. The same cannot be said with assurance of other burdensome legal relations. Such a condition certainly cannot be waived or dispensed with by the opposite party to the legal relation who will benefit by the waiver — the expectant holder of the right, power, privilege, or immunity.

The term *waiver* is one of those words of indefinite connotation in which our legal literature abounds; like a cloak, it covers a multitude of sins.¹ In the present instance the word is used to describe almost any voluntary act of a contracting party which operates to bring his legal duty into existence even in the absence of some fact that previously was a condition precedent. It may consist of a mere act of assent to the new legal relation; and although its legal operation is rendered more certain in case the other party gives a new consideration or acts in reliance upon the waiver, neither consideration nor change of position seems to be necessary. The new act of assent operates as a substitute for that which previously was a condition, and it so operates in the case of both express and constructive conditions.²

¹ See Ewart, (1917) *Waiver Distributed*.

² Where time is of the essence, the condition can be waived by granting an extension, and the one so waiving cannot thereafter enforce a provision for liquidated damages for delay. *Maryland Steel Co. v. United States*, (1915) 235 U.S. 451.

"He may waive the condition, and accept the title though defective. If he does, the seller may not refuse to convey because the buyer could not have been compelled to waive. . . . We think the waiver to be effective did not call for the seller's approval. . . . From the moment that the waiver was announced, the remedy was mutual." *Catholic F. M. Society v. Ousani*, (1915) 215 N.Y. 1.

See further *Korman v. Trainer*, (1917) 258 Pa. 362; *Cape May R.E. Co. v. Henderson*, (1911) 231 Pa. 82.

Where the plaintiff sues on an express contract and avers full performance of conditions, it is a variance to prove substantial performance and a waiver. *Allen v. Burns*, (1909) 201 Mass. 74.

The term waiver is also used to refer to conduct that now makes it inequitable to insist upon the previous condition, even though the party acting did not in fact assent to a waiver.¹ In these cases, however, there must be some change of position by the other party in reliance upon the supposed waiver. The conduct and its results must create an estoppel.

It will be observed that the doctrine of waiver is practically a nullification of the doctrine of consideration in certain cases. Where there is an estoppel the case falls easily within the group of cases holding that certain kinds of subsequent reliance upon a promise are a sufficient consideration;² but where the waiver consists of a mere voluntary assent there is no consideration of any sort, and yet a legal duty is being created where none previously existed.³ This doctrine applies, however, only to conditions in the sense heretofore explained, as including operative facts subsequent to acceptance. One cannot create a primary obligation by "waiver"; for that there must be a specialty or a consideration. No doubt in most cases of waiver, it will be found that there has been a change of position by the other party in reliance upon the act of waiver.

366. Prevention by the defendant of the fulfillment of a condition. Where the non-fulfillment of a condition precedent to the defendant's duty has been caused by the act of the defendant himself, such act will gravely affect the existing legal relations.

(1) In many cases it will be held to be a "*waiver*" of the *condition*.⁴ Thus in contracts of employment the doing of the work

¹ The approval of an architect as a condition may be waived by accepting and using the building. *Pennsylvania Rubber Co. v. Detroit Shipbuilding Co.*, (1915) 186 Mich. 305. Also by making a number of payments without insisting on the certificate. *McKenna v. Vernon*, (1917) 258 Pa. 18; *Mayer Const. Co. v. Amer. Sterilizer Co.*, (1917) 258 Pa. 217. Also by accepting a short delivery of goods. *Craig v. Lane*, (1912) 212 Mass. 195.

² See *ante*, § 127, note.

³ Where proof of loss within a fixed time is made a condition by an insurance policy, the condition may be waived even after the expiration of the period fixed. *Johnson v. Bankers &c. Co.*, (1915) 129 Minn. 18; *Desell v. Fidelity &c. Co.*, (1903) 176 Mo. 253; *Kiernan v. Dutchess &c. Co.*, (1896) 150 N.Y. 190; *Lebanon &c. Co. v. Erb*, (1886) 112 Pa. 149; *Owen v. Farmers &c. Co.*, (1869, N.Y.) 57 Barb. 518.

⁴ *Young v. Hunter*, (1852) 6 N.Y. 203; *Ripley v. McClure*, (1849) 4 Exch. 345; *Mansfield v. Hodgdon*, (1888) 147 Mass. 304; *Louisville & N.R. Co. v. Goodnight*, (1874, Ky.) 10 Bush, 552; *United States v. United Eng. & Con. Co.*, (1914) 234 U.S. 236; *Pneumatic Signal Co. v. Texas & P.R.R. Co.*, (1910) 200 N.Y. 125; *Batterbury v. Vyse*, (1863) 2 H. & C. 42; *French Civil Code*, § 1178; *Ulpian*, Dig. 50, 17, 161.

is usually a condition precedent to the duty of the employer to pay, but if the workman is wrongfully discharged he can maintain an action for damages without showing that the work was done.¹ In such a case, however, the workman is not now generally held to be entitled to maintain an action of *debt* for the full contract price. The actual rendition of the service is still a condition precedent to such a right, because it is not regarded as just for the plaintiff to have both his time and his money, even though the defendant is in the wrong.²

(2) In other cases the act of the defendant has been held to be a *breach of contract* on the theory that he has promised, expressly or impliedly, not to prevent the fulfillment of the condition.³ In some of these cases the inference of a promise seems far-fetched.

(3) A suggestion has been thrown out that the act of the defendant is a *tort*.⁴ This could be justified on the theory that the plaintiff had a valuable *power* to create rights by fulfilling a condition and the act of the defendant is a wrongful destruction of this power. The defendant's act will of course be tortious if it amounts to the conversion or destruction of some physical property of the plaintiff.

(4) If the defendant has already received benefits from a part-performance by the plaintiff, he should certainly be bound to pay the reasonable value thereof, as a *quasi contract* or non-contract debt.⁵ This is correct beyond question if the prevention by the defendant was not a privileged act, and it seems probably correct even if the defendant's act was privileged.

(5) In some cases the prevention by the defendant has been held to be privileged.⁶ In such case the defendant is liable

¹ *Barton v. Gray*, (1885) 57 Mich. 622; *McCargo v. Jergens*, (1912) 206 N.Y. 363, 372; *Tucker v. Boston*, (1916) 223 Mass. 478.

² See *post*, § 385.

³ Where the plaintiff had agreed to buy certain land and then to convey it to the defendant who promised to pay a price, and later the defendant bought the land himself, the plaintiff was held entitled to damages. *Patterson v. Meyerhofer*, (1912) 204 N.Y. 96. To similar effect are *Dupont Powder Co. v. Schlottman*, (1914, C.C.A.) 218 Fed. 353; *Simon v. Etgen*, (1915) 213 N.Y. 589; *Brucker v. Manistee R.R. Co.*, (1911) 166 Mich. 330; *Gay v. Blanchard*, (1880) 32 La. Ann. 497, 504; *U.S. v. Behan*, (1884) 110 U.S. 338; *Vynior's case*, (1610) 8 Co. Rep. 81b; *Warburton v. Storr*, (1825) 4 B. & C. 102. But see, *contra*, *Clark v. Hovey*, (1914) 217 Mass. 485.

⁴ *MacPherson v. Mackay*, (1918, N.J.) 103 Atl. 36. The case might perhaps be brought within the doctrine of *Lumley v. Gye*, (1853) 2 El. & Bl. 216.

⁵ *Hoyt v. Pomeroy*, (1913) 87 Conn. 41.

⁶ *Clark v. Hovey*, *supra*. A case may be supposed where the plaintiff has

neither for breach of contract nor in tort, and probably the condition precedent to his own contractual duty should not be regarded as waived.

The problem discussed above is to be distinguished from prevention by the plaintiff of performance by the defendant in accordance with the latter's promise. In case of such a prevention the defendant is not guilty of a breach.¹

367. The doctrine of substantial performance. There has arisen in the United States an indefinite doctrine sometimes referred to as that of substantial performance. It is a doctrine that deals not with performance of a duty as a discharge thereof but with performance by the plaintiff as a condition precedent to the active duty of performance by the defendant. Where a defendant is sued for non-performance he cannot avoid paying damages by showing that he substantially performed or came near performing or gave something equally good; but he can always successfully defend if in fact some condition precedent to his own duty has not been fulfilled by the plaintiff.

Suppose that the plaintiff has substantially performed as required by his own promise but not completely in every detail, — the court must now determine whether or not some act unperformed was a condition precedent to the defendant's duty. It is never correct to say that substantial fulfillment of a condition is sufficient; but it is frequently correct to say that absolutely exact and complete performance by the plaintiff as promised is not a condition precedent to the duty of the defendant. If substantial performance by the plaintiff was sufficient to charge the defendant, then such substantial performance was the only condition and it was exactly fulfilled. The question of the plaintiff's duty to pay damages for his own partial non-performance is a different question altogether. It is always necessary to distinguish a promise as an operative act in itself from other subsequent facts that operate as conditions of a duty that is to follow a promise.

Where the defendant has clearly stipulated that a certain performance by the plaintiff must precede his own duty to pay,

been prevented from delivering certain goods as agreed by the fact that the defendant in his effort to obtain a sufficient quantity for some lawful purpose has bought up the entire supply.

¹ See *United States v. Peck*, (1880) 102 U.S. 64; *Porto Rico v. Title Guar. & Surety Co.*, (1913) 227 U.S. 382, 389; 2 *Coke*, Inst. ch. 27, 19; *Rolle Abr.* 453 (N) 3, 4. Cf. *Blandford v. Andrews*, (1599) *Cro. Elis.* 694.

the specified performance is a condition precedent. The court can, it is true, accept "something almost as good," making it operate as the only condition, and then compel the defendant to pay. This is what the irreverent might describe as making a contract for the parties. But if the defendant has not stipulated that the performance by the plaintiff shall be a condition precedent to his own active duty, but has merely caused the plaintiff to make a promise and thus undertake a duty on his own part, now the court need not require any performance at all by the plaintiff as a condition precedent to the defendant's duty, and if it requires any performance at all as a condition it may be fair and just to require only substantial performance as such condition.

Our conclusions may be stated as follows:

(1) All conditions must be fulfilled exactly.

(2) What is a condition is a question of interpretation and construction (in the broadest sense).

(3) Substantial performance of the acts promised by the plaintiff may be the only condition of the defendant's duty, either by reasonable inference of fact or by pure construction of law.

368. *Illustrations.* A few illustrations may be given to show when the courts have held that substantial performance (and not complete performance of all the promised acts) is an exact fulfillment of the condition precedent to the defendant's duty.

Where the vendor has promised to convey a farm containing 200 acres and it turns out that the farm contains but 195 acres, a court of equity in its discretion may grant the vendor specific performance against the vendee, deducting a proportionate amount from the purchase price.¹ But if the variation is great the court will not compel the purchaser to perform.² A similar rule has been adopted in common-law actions in many states, and particularly in the adjustment of rights under building contracts. If the contractor has acted in good faith and has substantially performed, he will be allowed to recover notwithstanding slight deviations from the contract, but his recovery

¹ *King v. Bardeau*, (1822, N.Y.) 6 Johns. Ch. 38; *Foley v. Crow*, (1872) 37 Md. 51; *Dyer v. Hargrave*, (1805) 10 Vesey, 505; *Creigh v. Boggs*, (1882) 19 W.Va. 240.

² *Wetmore v. Bruce*, (1890) 118 N.Y. 319; *Lombard v. Chicago Congregation*, (1872) 64 Ill. 477.

will be diminished by the amount necessary to compensate for the deficiency.¹ But deviations which are more than slight or trivial, or which are wilful, will defeat a recovery.²

369. Contracts conditioned upon personal satisfaction. One party to a contract may expressly promise that he will do his work to the personal satisfaction of the promisee. There is nothing improper about such a promise, and for failure to perform as agreed and to satisfy the promisee the latter should certainly be entitled to damages. It does not follow, however, that the defendant's duty to pay the contract price is conditional upon such personal satisfaction. It may be made so in express terms, as where the defendant promises to pay "on condition" that he is satisfied or "after" he is satisfied. A doubt has sometimes been expressed whether there is any genuine contract in such a case;³ but the doubt seems not to be well founded, for the state of the promisee's mind is a fact to be ascertained by the jury on evidence introduced, and the defendant is not privileged not to pay if the jury finds that he was satisfied. His denial of satisfaction would not be conclusive. The doubt is well grounded if the defendant's promise is merely to perform if he shall *desire* to

¹ *Nolan v. Whitney*, (1882) 88 N.Y. 648; *Pitcairn v. Philip Hiss Co.*, (1902) 113 Fed. 492; *Jones & H. Co. v. Davenport*, (1901) 74 Conn. 418; *Hayward v. Leonard*, (1828, Mass.) 7 Pick. 181; *Palmer v. Britannia Co.*, (1901) 188 Ill. 508; *Ashley v. Henahan*, (1897) 56 Ohio St. 559. In *Crouch v. Gutmann*, (1892) 134 N.Y. 45, it is said in the dissenting opinion that the court has gone too far in making new contracts for the parties.

The recovery may be measured in two different ways: The plaintiff may recover the contract price, reduced by such an amount as the court may award on the defendant's counterclaim for damages. *Nolan v. Whitney*, *supra*. Or, if the condition precedent to his right to the contract price is not regarded as fulfilled, he may recover quasi-contractually the reasonable value of his defective performance after deducting the damages to which the defendant is entitled. See *Handy v. Bliss*, (1910) 204 Mass. 513; *Allen v. Burns*, (1909) 201 Mass. 74.

² *Gillespie Tool Co. v. Wilson*, (1888) 123 Pa. 19; *Van Clief v. Van Vechten*, (1892) 130 N.Y. 571; *Spence v. Ham*, (1900) 163 N.Y. 220; *Elliott v. Caldwell*, (1890) 43 Minn. 357; *Cornish & Co. v. Dairy Ass'n*, (1901) 82 Minn. 215.

The doctrine is applied in other classes of contracts also: *Drew v. Goodhue*, (1902) 74 Vt. 436; *Thompson v. Brown*, (1898) 106 Iowa, 367; *Main v. Oien*, (1891) 47 Minn. 89; *Ponce v. Smith*, (1892) 84 Me. 266; *Hathaway v. Lynn*, (1889) 75 Wis. 186; *Desmond-Dunne Co. v. Friedman-Docher Co.*, (1900) 162 N.Y. 486.

The principles of quasi-contract should apply where the deviation is great or even wilful.

³ *Folliard v. Wallace*, (1807, N.Y.) 2 Johns. 395; *Duplex Safety Boiler Co. v. Garden*, (1886), 101 N.Y. 387.

do so, or if the defendant's own *expression* of satisfaction is made *conclusive*.¹

In construing contracts requiring personal satisfaction a distinction is drawn between those where performance must be measured and judged by standards of personal taste, feeling, or sentiment and those where the determination depends merely upon market value or mechanical fitness and utility. In the former class, if the plaintiff promised to satisfy the defendant, the latter's personal satisfaction is generally held to be a condition precedent to his duty to pay even though it is not so described in words by the parties. This is because there really are no standards by which the court or jury can measure performance. In the latter class, personal satisfaction will never be held to be a condition precedent unless it is clearly so described, and the court will be not unlikely even then to substitute the satisfaction of a reasonable man.² The decision will depend in part on whether the plaintiff will suffer a heavy loss or the defendant receive unjust enrichment in case personal satisfaction is held to be a condition. An increasing liberality is to be noted in allowing a quasi-contractual recovery by a plaintiff in default, but this is available only where the defendant has received value and not where the plaintiff will merely suffer a heavy loss.

370. Matters of personal taste. In contracts involving personal taste an agreement by *X* to perform to the satisfaction of *B* constitutes *B* the sole judge, and *X* cannot recover until *B* is in fact satisfied.³ This severe doctrine is qualified by the requirement that *B*'s dissatisfaction shall be genuine and not feigned; but it may nevertheless be unreasonable, since *B* is the sole judge and his standard of taste is the sole test.

371. Sale of goods. In a sale of goods upon a contract that the goods may be returned if not satisfactory to the buyer, the above rule will clearly apply if the article is one involving per-

¹ *Hunt v. Livermore*, (1828, Mass.) 5 Pick. 395; *Hawkins v. Graham*, (1890) 149 Mass. 284; *Great Northern Ry. Co. v. Witham*, (1873) L.R. 9 C.P. 16.

² See *Magee v. Scott &c. Co.*, (1899) 78 Minn. 11; *Folliard v. Wallace*, (1807, N.Y.) 2 Johns. 395 (express condition of satisfaction with title to land).

³ *Pennington v. Howland*, (1898) 21 R.I. 65 (portrait); *Gibson v. Cranage*, (1878) 39 Mich. 49 (portrait); *Zaleski v. Clark*, (1876) 44 Conn. 218 (bust); *Brown v. Foster*, (1873) 113 Mass. 136 (suit of clothes); *Koehler v. Buhl*, (1893) 94 Mich. 496 (personal services); *Crawford v. Pub. Co.*, (1900) 163 N.Y. 404 (newspaper contributor).

sonal taste.¹ It is also usually held that if the contract makes the buyer the sole judge he may return the articles even if they do not involve strictly a matter of personal taste, at least in all cases where he can place the seller in *statu quo*.² But in articles involving personal taste the courts lay particular emphasis upon the rule that the buyer's dissatisfaction must be genuine and not feigned.³

372. Contracts for work and material. When the consideration furnished is of such a nature that its value will be largely or wholly lost to the one furnishing it unless paid for, and it is not a matter that ordinarily involves merely personal taste, the courts are inclined wherever possible to hold that the satisfaction of a reasonable man is a fulfillment of the condition.⁴

But if the work and material are to result in something involving personal taste or comfort the genuine dissatisfaction of the promisor will defeat a recovery.⁵ And even in cases not involving personal taste or comfort the contract may so clearly be conditioned upon the personal satisfaction of the defendant that a *bona fide* dissatisfaction, even if unreasonable, will defeat recovery against him.⁶

¹ McClure v. Briggs, (1886) 58 Vt. 82 (organ); McCarren v. McNulty, (1856, Mass.) 7 Gray, 139 (bookcase); Fechteler v. Whittemore, (1910) 205 Mass. 6 (satisfaction to a reasonable man held sufficient).

² Campbell Printing Press Co. v. Thorp, (1888) 36 Fed. 414 (printing-press); Walter A. Wood & Co. v. Smith, (1880) 50 Mich. 565 (harvesting machine); Goodrich v. Van Nortwick, (1867) 43 Ill. 445 (fanning mill); Aiken v. Hyde, (1868) 99 Mass. 183 (gas generator); Singlerly v. Thayer, (1885) 108 Pa. 291 (passenger elevator); Exhaust Ventilator Co. v. Chicago &c. R., (1886) 66 Wis. 218 (exhaust fans).

³ Silsby Mfg. Co. v. Chico, (1885) 24 Fed. 893; Hartford Sorghum Co. v. Brush, (1871) 43 Vt. 528.

⁴ Duplex Safety Boiler Co. v. Garden, (1886) 101 N.Y. 387 (express condition disregarded); Sloan v. Hayden, (1872) 110 Mass. 141; Hawkins v. Graham, (1889) 149 Mass. 284; Doll v. Noble, (1889) 116 N.Y. 230; Hummel v. Stern, (1900) 21 App. Div. 544, aff'd 164 N.Y. 603; Lockwood Mfg. Co. v. Mason Regulator Co., (1903) 183 Mass. 25; Keeler v. Clifford, (1897) 165 Ill. 544.

⁵ Adams Radiator & Boiler Works v. Schnader, (1893) 155 Pa. 394; Schmand v. Jandorf, (1913) 175 Mich. 88 (skilled service).

⁶ Williams Mfg. Co. v. Standard Brass Co., (1899) 173 Mass. 356; Fire Alarm Co. v. Big Rapids, (1889) 78 Mich. 67.

If the satisfaction required is that of some third party, the court is much more likely to hold that his personal satisfaction is a condition. Butler v. Tucker, (1840, N.Y.) 24 Wend. 446.

CHAPTER XIV

Impossibility in Contract Law

1. *Non-fulfillment of a condition due to impossibility*

373. **Impossible conditions.**¹ We must first distinguish (and set aside for discussion later) the question of *possibility* of performance of a thing promised as a condition precedent to the duty of the promisor. Where such performance is legally or physically impossible at the time the promise is made, no duty arises, not even a liability to a duty. In such case the acceptance is an inoperative fact and we should say that no contract is formed. Where the impossibility arises subsequently to acceptance, the existing liability (or conditional duty) is discharged. The absence of such impossibility is a condition precedent to the duty of the promisor to perform as promised and to his secondary duty to pay damages for breach.²

In the present section we are dealing with cases where performance by the defendant of the acts promised is entirely possible, but where there is a condition precedent to his duty of performance that is legally or physically impossible of fulfillment. In this case, also, the impossibility may exist at the time of acceptance or may arise subsequently. Suppose the defendant has promised to pay \$100, but only on condition that *X* shall reach the moon. Here the act to be performed by the defendant is quite possible but the act to be performed by *X* is not. Here no duty or liability is created, and the defendant's promise would no doubt be held to be inoperative as a consideration for a return promise. Suppose the defendant has promised to pay \$100, but the promise is to be void if *X* shall reach the moon. Here the reaching of the moon is a condition subsequent and since it cannot be fulfilled the promise creates an unconditional duty to pay.³ In this case the not reaching of the moon is in fact a condi-

¹ This section is by the American editor.

² See *post*, §§ 376-80.

³ See *Rolle Abr.* 420 (E); *Co. Litt.* 206. The same result obtains where the fulfillment of a condition subsequent becomes impossible after the formation of the contract. Such a condition subsequent has been flatly disregarded in a case where the fulfillment of the condition was made *inevitable* (not impossible) by act of the law. *Semmes v. Hartford Ins. Co.*, (1871, U.S.) 13 Wall. 158.

tion precedent to the active duty of payment, but since the condition is certain of fulfillment it may be disregarded.

The same results are obtained where the fulfillment of the condition becomes impossible after acceptance of the offer but before the time for performance, except that in this case the defendant's promise is a sufficient consideration for the return promise and there was a valid contract. If *B* promises to paint a house and *A* promises to pay \$100 after the house is painted, there is a valid contract; but if the house is totally destroyed before painting, *A* is under no contract duty to pay \$100. In such a case it is possible for the court to create a non-contract debt to pay for value received, but this is quite a different matter. Suppose *B* has built a house in return for *A*'s promise to pay after architect *X* shall certify his approval, and *X* dies or becomes insane before he can inspect the house. It is altogether probable that a court would disregard the condition here and compel *A* to pay the agreed sum on a reasonable showing that the house is properly built.¹ In so holding, the court is either determining that the certificate was not in fact a condition or else it is creating a quasi-contractual duty.

374. Non-existence or non-occurrence of a particular state of things. Where a contract is entered into on the assumption by both parties that a particular state of things exists or will occur, the non-existence or the non-occurrence of that state of things, through default of neither party, terminates the liability and prevents the accrual of a duty dependent upon it.

This rule deserves now, in view of recent cases, a separate consideration.² It was much discussed in connection with con-

¹ See *Reed v. Loyal Protective Association*, (1908) 154 Mich. 161; *London and N.E. Co. v. Schlesinger*, [1916] 1 K.B. 20; *Mayer Const. Co. v. Amer. Sterilizer Co.*, (1917) 258 Pa. 217; *Deyo v. Hammond*, (1894) 102 Mich. 122; *Trippe v. Provident Fund Society*, (1893) 140 N.Y. 23; *Comstock v. Fraternal Accident Ass'n*, (1903) 116 Wis. 382; *Leiston Gas Co. v. Leiston &c. Council*, [1916] 2 K.B. 428. Cf. *Whiteside v. North American Acc. Ins. Co.*, (1911) 200 N.Y. 320.

² The question is merely one of whether or not the defendant's duty was expressly or constructively conditional upon the existence or occurrence of the supposed state of things. If King Edward had been the promisor, and performance required his bodily presence, his severe illness would make performance by him impossible and would be a legal excuse. *Spalding v. Rosa*, (1877) 71 N.Y. 40. The actual cases were quite different from this. So also, the breaking out of the war with Germany might make lawful performance by the defendant impossible, and this would discharge him. On the other hand, it might not make performance at all impossible but might subject the defendant to unreasonable danger of property loss and cause a court to hold that the defendant's duty was constructively conditional upon

tracts made in view of the ceremonies contemplated at the time of the coronation in 1902, and frustrated by the illness of King Edward, and, more recently, in connection with contracts interrupted by the war with Germany.^a

In *Krell v. Henry*,^b the defendant agreed to hire the plaintiff's flat for June 26 and 27; the contract contained no reference to the coronation processions, but they were to take place on those days and to pass by the flat. The rent had not become payable when the processions were abandoned and the Court of Appeal held that the plaintiff could not recover it.

"I do not think," said Vaughan Williams, L.J.,^c "that the principle . . . is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract, or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but if required from necessary inferences drawn from surrounding circumstances, recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things."

But the contract is valid and subsisting up to the moment at which impossibility supervenes. In another case, therefore, where the rent was payable before the date of the procession, it was held that it could be recovered, though the procession was abandoned: "the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but . . . any payment previously made and any legal right previously accrued according to the terms of the agreement will not be disturbed."^d

And if the existence of a particular state of things is merely the *motive or inducement* to one party to enter into the contract but cannot be said to be the basis on which the contract was entered into, the rule has no application.^e The charter of a ship to see the coronation review and to cruise round the fleet was

^a *Horlock v. Beal*, [1916] A.C. 486.

^d *Chandler v. Webster*, [1904] 1 K.B. 493.

^b [1903] 2 K.B. 740.

^c At p. 749.

^e At p. 501.

the continued existence of a peaceful prospect. See *Guaranty Trust Co. v. North German Lloyd*, (1917, U.S.) 37 Sup. Ct. R. 490. The fact that the war has made further performance "economically unprofitable" does not justify failure to perform, even though there is an express provision as to contingencies beyond their control that prevent or hinder. *Dixon v. Henderson*, (1917, K.B.) 117 L.T. 636; *Wilson v. Tennants*, (1917, C.A.) 114 L.T. 878, [1917] 1 K.B. 208.

held to be a contract of this kind in *Herne Bay S.S. Co. v. Hutton*;* but obviously it is often very difficult to draw the distinction.¹

2. *Non-fulfilment of a duty due to impossibility of the promised performance*

375. Precedent impossibility. Impossibility of performance may appear on the face of the contract, or may exist, unknown to the parties, at the time of making the contract, or may arise after the contract is made.

Where there is obvious physical impossibility, or legal impossibility apparent upon the face of the promise, there is no contract, because such a promise is no consideration for any promise given in respect of it.²

Impossibility which arises from the non-existence of the subject-matter of the contract avoids it. This may be based on mutual mistake, for the parties have contracted on an assumption, which turns out to be false, that there is something to contract about.³

376. Subsequent impossibility: general rule. Impossibility which arises subsequently to the formation of a contract does not, as a rule, excuse from performance.⁴

^a [1903] 2 K.B. 683.

^b *Scott v. Coulson*, [1903] 2 Ch. 249, note 1. The case of *Clifford v. Watta*, (1870) L.R. 5 C.P. 577, which illustrates the principle, is difficult to reconcile with the earlier one of *Hills v. Sughrue*, (1846) 15 M. & W. 253; but both turned on the construction of a document, in the one case a mining lease, in the other a charter-party; and in questions of construction it is not always safe to argue from the decision in one case to that in another.

¹ The distinction is so difficult that the present editor is unable to draw it at all. It is to be observed in the first place that these coronation cases do not belong under the head of impossibility of performance. In all three of the cases mentioned in the text, the performance of every act agreed upon by plaintiff and defendant remained as easy to perform after the king's illness as before. These acts consisted of delivery of possession by the owner on the one hand and the payment of the agreed sum by the hirer on the other hand. The real question here is, should the law construct a condition precedent to the right of the plaintiff and the duty of the defendant, and thus do for the parties "What they would have done for themselves if they had anticipated the march of nature" (i.e., the illness of the king). See 3 Bentham, Works, 190. If the defendant's duty in *Krell v. Henry* was thus constructively conditional, probably the same should have been held in *Herne Bay S.S. Co. v. Hutton*. In *Chandler v. Webster*, the question is somewhat different. The active duty of the defendant to pay actually arose. Should it be discharged by the occurrence of some constructive condition subsequent? If *Krell v. Henry* is to be approved, the answer to this question should be affirmative.

² See *ante*, § 129.

³ See *ante*, §§ 187, 188.

⁴ The rule is thus very generally stated. It is believed, however, that it is essentially inaccurate. A better rule is the following: *Increased or un-*

I shall speak hereafter of what are termed "conditions subsequent," or "excepted risks," and what is there said may serve to explain the rule now laid down.¹ If the promisor make the performance of his promise conditional upon its continued possibility, the promisee takes the risk. If performance should become impossible, the promisee must bear the loss. If the promisor makes his promise unconditionally, he takes the risk of being held liable even though performance should become impossible by circumstances beyond his control.

Paradine sued Jane for rent due upon a lease. Jane pleaded "that a certain German prince, by name Prince Rupert, an alien born, enemy to the king and his kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and

expected difficulty and expense do not, as a rule, excuse from performance. *Rowe v. Peabody*, (1911) 207 Mass. 226; *Carnegie Steel Co. v. U.S.*, (1915) 240 U.S. 156. The cases where the supposed impossibility was held to be no defense are practically all applications of this latter rule. See *Anderson v. May*, (1892) 50 Minn. 280; *Dermott v. Jones*, (1864, U.S.) 2 Wall. 1; *Harmony v. Bingham*, (1854) 12 N.Y. 99; *Tompkins v. Dudley*, (1862) 25 N.Y. 272. In building contract cases like *School Dist. v. Dauchy*, (1857) 25 Conn. 530, and *Trustees v. Bennett*, (1859) 27 N.J. L. 513, performance at the time agreed may have become practically impossible; but time might not be of the essence; and, if so, substantial performance is still possible. Even if time is of the essence this may be waived by the party whose duty was conditional on performance on time.

It will be difficult to find a case where the court has refused to excuse a contractor where performance has become legally or physically impossible through no fault of his. The court is always ready to find that the promise was constructively conditional upon continued possibility of performance. Indeed, cases are not wanting where it has been held that greatly increased and unexpected difficulty excused a promisor from performance. See *Clarksville Land Co. v. Harriman*, (1895, N.H.) 44 Atl. 527. Cf. *Berg v. Erickson*, (1916, C.C.A.) 234 Fed. 817. Where performance has become unreasonably dangerous to life, no action will lie for non-performance. *Lakeman v. Pollard*, (1857) 43 Me. 463; *Lawrence v. Twentiman*, (1611) Rolle Abr. 450 (G) 10. Cf. *Hall v. Wright*, (1858) El. Bl. & El. 746. In a recent celebrated case it was held that a reasonable fear of capture by a hostile power excused non-performance by a shipmaster. *Guaranty Trust Co. v. North German Lloyd*, (1917, U.S.) 37 Sup. Ct. 490. Cf. *Watts & Co. v. Mitsui & Co.*, [1917] A.C. 227; *Horlock v. Beal*, [1916] A.C. 486. A promisor's liability is not terminated by reason of "economic unprofitableness" caused by the war. *Dixon v. Henderson*, (1917, K.B.) 117 L.T. 636; *Wilsons v. Tennants*, (1917, C.A.) 114 L.T. 878, [1917] 1 K.B. 208; *Associated Port. Cem. M'f'rs v. Cory*, (1915) 31 T.L.R. 442.

The outbreak of war may make further performance illegal, and this terminates liability. *Zinc Corp. v. Hirsch*, [1916] 1 K.B. 541.

Impossibility of performance by the defendant as an excuse when charged with breach of duty must be distinguished from impossibility of fulfilling a condition precedent to the plaintiff's right. See *ante*, § 373.

¹ See *post*, § 420.

held out of possession . . . whereby he could not take the profits." The plea then was in substance that the rent was not due, because the lessee had been deprived, by events beyond his control, of the profits from which the rent should have come.

But the court held that this was no excuse; "and this difference was taken, that *where the law creates a duty or charge* and the party is disabled to perform it without any default in him, and hath no remedy over, *there the law will excuse him*. As in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused. . . . But when the party *by his own contract creates a duty or charge upon himself*, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."^a

Modern illustrations of the rule are to be found in the promise made by the charterer of a vessel to the ship-owner that the cargo shall be unloaded within a certain number of days or payment made as "demurrage."^b

A cargo of timber was agreed to be made up into rafts by the master of the ship, and in that state removed by the charterer. Storms prevented the master from doing his part, but this default did not release the charterer from his promise to have the cargo unloaded within the time specified.^c So too a dock strike affecting the labor engaged both by ship-owner and charterer does not release the latter. He makes "an absolute contract to have the cargo unloaded within a specified time. In such a case the merchant takes the risk."^d

^a *Paradine v. Jane*, (1647) Aleyn, 26. ^b See Appendix, note to form of charter-party.

^c *Thlie v. Byers*, (1876) 1 Q.B.D. 244.

^d *Budgett v. Binnington*, [1891] 1 Q.B. 35. Compare this case with one in which the charter-party does not fix a definite time for unloading the cargo. In such cases a reasonable time is allowed, and the event of a dock strike would extend the time which should be regarded as reasonable. *Hulthen v. Stewart*, [1903] A.C. 389.

¹ It will be observed that in *Paradine v. Jane*, *supra*, the duty of the defendant was to pay rent. The performance of this duty did not become impossible at all, and the question before the court was whether non-interference by the king's enemies was a constructive condition precedent to liability for non-payment.

² If the carrier stipulates for a particular time he takes the risk; but if there is no such stipulation, a reasonable time is understood, and this may be extended by unavoidable delays due to a strike. *Empire Transp. Co. v. Philadelphia &c. Co.*, (1896) 77 Fed. 919; *Geismer v. Lake Shore &c. Co.*, (1886) 102 N.Y. 563; *Pittsburg &c. R. v. Hollowell*, (1879) 65 Ind. 188. For additional authorities, see 35 L.R.A. 623 note. An employee compelled to quit by strikers may recover in *quantum meruit*, but subject to deduction for damages for breach of his contract. *Walsh v. Fisher*, (1899) 102 Wis. 172. These illustrations are clearly all cases of mere increased difficulty and not of total impossibility.

377. Same: exceptions. To the general rule there is a group of exceptions, somewhat widened by recent decisions, in which subsequent impossibility discharges the contract. These we must distinguish from cases in which the Act of God is said to discharge a contract; for this use of the term "Act of God" has been condemned by high authority.^a

The Act of God, as we have seen, is introduced into certain contracts as an express, or, by custom, an implied condition subsequent¹ absolving the promisor. But there are also forms of impossibility which are said to excuse from performance because "*they are not within the contract*," that is to say, that neither party can reasonably be supposed to have contemplated their occurrence, so that the promisor neither excepts them specifically, nor promises unconditionally in respect of them. With these we will deal *seriatim*.

378. Change in law. *Impossibility arising from a change in the law of our own country or from the lawful act of the executive exonerates the promisor.*²

Baily was lessee to De Crespigny, for a term of 89 years, of a plot of land: De Crespigny retained the adjoining land, and covenanted that neither he nor his assigns would, during the term, erect any but ornamental buildings on a certain paddock fronting the demised premises. A railway company, acting under parliamentary powers, took the paddock compulsorily, and built a station upon it. Baily sued De Crespigny upon the cove-

^a Per curiam in *Baily v. De Crespigny*, (1869) L.R. 4 Q.B. 180, at p. 185.

¹ Subsequent to the primary obligation (including the present liability to a future duty), but the absence of prevention by act of God is a condition precedent to any secondary obligation or any duty of immediate performance.

² *Louisville & N. R.R. Co. v. Mottley*, (1911) 219 U.S. 467; *Cowley v. N.P. R.R. Co.*, (1912) 68 Wash. 558; *Cordes v. Miller*, (1878) 39 Mich. 581; *Jamieson v. Indiana Natural Gas Co.*, (1891) 128 Ind. 555; *Baltimore &c. R. v. O'Donnell*, (1892) 49 Ohio St. 489.

It appears also that a promisor's liability may be terminated where his performance is prevented by some act of the state, even though the act is brought about by the fault or inefficiency of the promisor himself. *Hughes v. Wamsutta Mills*, (1865, Mass.) 11 Allen, 201 (prevention by imprisonment for crime); *Moshens v. Independent Order of A I* (1913) 215 Mass. 185 (injunction due to illegal acts); *People v. Globe Mut. L. I. Co.*, (1883) 91 N.Y. 174 (dissolution of corporation for failure to maintain a reserve).

Impossibility due to bankruptcy does not terminate liability. *Central Trust Co. v. Chicago Auditorium*, (1915) 240 U.S. 581.

Impossibility due to foreign law ought frequently to be held to terminate liability. See *Ford v. Cotesworth*, (1870) L.R. 5 Q.B. 544; *Cunningham v. Dunn*, (1878) 3 C.P.D. 443.

nant: it was held that impossibility created by statute excused him from the observance of his covenant.

"The legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, *has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into.* To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties."^a

In a later case *M* had contracted to sell to *X* a parcel of wheat lying in a Liverpool warehouse, but before delivery the wheat was requisitioned by the Government under powers given by an Act passed before the date of the contract. It was held that the vendor was discharged from his obligation to deliver, and Lord Reading, C.J., said:

"It is true that the act to be performed was not rendered unlawful by an act of the legislature passed since the entering into of the contract, but it was a lawful act of state which equally rendered the delivery of these specific goods impossible."^b

If the contract had not been for the delivery of specific goods, the decision would have been different; for in that case the performance of the contract would not have been impossible, though it might have been rendered more difficult and expensive.

379. Destruction of subject-matter discharges contract. *Where the existence of a specific thing is essential to the performance of the contract, its destruction, through no default of either party, operates as a termination of the promisor's liability.*¹

In the case of *Taylor v. Caldwell* ^c the defendant agreed to let the plaintiff have the use of a music hall for the purpose of giving concerts upon certain days: before the days of performance arrived the music hall was destroyed by fire, and Taylor sued Caldwell for losses arising from the consequent breach of contract.

The court held that

"In the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract,

^a *Baily v. De Crespigny*, *supra*. [No impossibility here; defendant fully performed.]

^b *In re Shipton & Harrison's arbitration*, [1915] 3 K.B. 676. ^c (1863) 3 B. & S. 826.

¹ *Dexter v. Norton*, (1871) 47 N.Y. 62; *Young v. Leary*, (1892) 135 N.Y. 569; *Huguenin v. Courtenay*, (1884) 21 S. Car. 403; *Thomas v. Knowles*, (1879) 128 Mass. 22; *Carroll v. Bowersock*, (1917) 100 Kan. 270. But if one contracts against loss or destruction he is bound by the stipulation and assumes that risk. *Wilmington Trans. Co. v. O'Neil*, (1893) 98 Cal. 1.

but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."¹

The same principle was applied in *Appleby v. Myers*.^a The plaintiffs undertook to erect certain machinery upon the defendant's premises and keep it in repair for two years. While the work was in progress the premises were wholly destroyed by fire. It was held that there was no absolute promise by Myers that his premises should continue in a fit state for Appleby's work, that the fire was a misfortune equally affecting both parties, and terminating their liabilities.²

And it is not necessary that the destruction of the thing should be absolute: it is enough if it ceases so to exist as to be fit for the purpose contemplated by the contract. In *Nickoll and Knight v. Ashton, Eldridge & Co.*,^b a cargo sold by the defendants to the plaintiffs was to be shipped by a specified ship; without default on the defendants' part the ship was so damaged by stranding as to be unable to load within the time agreed, and the court held that in these circumstances the liability created by the agreement must be treated as at an end.³

By the Sale of Goods Act^c an agreement to sell specific goods is avoided if, before the risk has passed to the buyer, by fault of neither party the goods perish.⁴

380. Incapacity for personal service terminates liability. *The liability under a contract which has for its object the rendering of personal services is terminated by the death or incapacitating illness of the promisor.*⁵

^a (1867) L.R. 2 C.P. 651. ^b [1901] 2 K.B. (C.A.) 126. ^c 56 & 57 Vict. c. 71, § 7.

¹ *Stewart v. Stone*, (1891) 127 N.Y. 500.

² While the liability is terminated by the destruction of the principal thing to which work or material is to be added, recovery may be had for the work performed before such destruction. *Angus v. Scully*, (1900) 176 Mass. 357; *Cleary v. Sohler*, (1876) 120 Mass. 210; *Niblo v. Binsse*, (1864, N.Y.) 3 Abb. App. Dec. 375, s.c. 1 Keyes, 476; *Whelan v. Ansonia Clock Co.*, (1884) 97 N.Y. 293; *Haynes v. Church*, (1885) 88 Mo. 285. But see *contra*, *Siegel, Cooper & Co. v. Eaton & Prince Co.*, (1897) 165 Ill. 550, where recovery was allowed only for installments actually due.

³ *The Tornado*, (1882) 108 U.S. 342; *Lovering v. Buck Mt. Coal Co.*, (1867) 54 Pa. 291.

⁴ *Dexter v. Norton*, (1871) 47 N.Y. 62.

⁵ *Spalding v. Rosa*, (1877) 71 N.Y. 40; *Lacy v. Getman*, (1890) 119 N.Y. 109; *Johnson v. Walker*, (1892) 155 Mass. 253; *Allen v. Baker*, (1882) 86 N.C. 91.

An unforeseen peril, as the prevalence of cholera, may terminate contractual liability. *Lakeman v. Pollard*, (1857) 43 Me. 463. But see *Dewey v. Union School District &c.*, (1890) 43 Mich. 480. See *ante*, § 375, note.

In *Robinson v. Davison*,^a an action was brought for damage sustained by a breach of contract on the part of an eminent pianoforte player, who having promised to perform at a concert, was prevented from doing so by dangerous illness.

The law governing the case was thus laid down by Bramwell, B.:

"This is a contract to perform a service which no deputy could perform, and which in case of death could not be performed by the executors of the deceased; and I am of opinion that, by virtue of the terms of the original bargain, incapacity of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional and not absolute."¹

^a (1871) L.R. 6 Ex. 269.

¹ *Spalding v. Rosa, supra.*

CHAPTER XV

Breach of Contract and its Legal Effect

In the discussion of this subject three questions must be considered: (1) what is a breach (an operative *fact*); (2) what is the legal operation of a breach by the plaintiff with respect to the duties and liabilities of the defendant; (3) what is the legal operation of a breach by the defendant with respect to the rights and privileges of the plaintiff. The first two will be discussed under a single heading.

I. WHAT IS A BREACH? EFFECT OF THE PLAINTIFF'S BREACH UPON THE DEFENDANT'S LIABILITY

381. **New legal relations arising from breach of contract.** If one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise, including a right of action conferred upon the party injured by the breach. Besides this, there are circumstances in which the breach not only gives rise to a cause of action but will also discharge the injured party from such performance as may still be due from him.¹

But, though every breach of the contractual obligation confers a right of action upon the injured party, it is not every breach that will discharge him from doing what he has undertaken to do under the contract. The contract may be broken wholly or in part; and if in part, the breach may or may not be sufficiently important to operate as a discharge; or, if it be so, the injured party may choose not to regard it as such, but may continue to carry out the contract, reserving to himself the right to such damages as he may have sustained. It is often very diffi-

¹ If the duty of one party is expressly or constructively conditional upon some performance promised by the other, non-performance by the latter prevents the existence of any duty on the part of the former. This may properly be said to *discharge* the pre-existing liability (or conditional duty) of the former party, although it is not proper to say that it discharges the entire contract. A contract includes many rights, powers, privileges, and immunities, and correlative duties, liabilities, no-rights, and disabilities; not all of these will be terminated by one party's breach.

cult to ascertain whether or no a breach of one of the terms of a contract discharges the party who suffers by it.¹

By *discharge* we must understand, not merely the right to bring an action upon the contract because the other party has not fulfilled its terms (the contract still being in existence), but the right to consider oneself exonerated from any further performance under the contract, — the right to treat the legal relations arising from the contract itself as having come to an end, and merged in a new obligation, a *right of action*.²

382. Three forms of breach. We have therefore to ask, What are the circumstances which give rise to these rights and liabilities? What is the nature of the breach which amounts to a discharge of the duty resting on the other party?

A contract may be broken in any one of three ways: a party to a contract (1) may renounce his duties under it, (2) may by his own act make it impossible that he should fulfill them, (3) may totally or partially fail to perform what he has promised.

Of these forms of breach the first two may take place not only in the course of performance but also while the contract is still wholly executory, i.e., before either party is entitled to demand a performance by the other of his promise. The last can, of course, only take place at or during the time for the performance of the contract.

1. Breach by renunciation

This may take place either before performance is due or during performance itself.

383. Renunciation before performance is due. The parties to

¹ In other words, it is often very difficult to determine whether the duty of the one party is expressly or constructively conditional upon performance by the other — whether the breach of the latter goes to the *essence*.

² This new "obligation" is a *secondary* one, arising out of the breach of the *primary* obligation. Neither one can be regarded as a single legal relation and the term "right of action" is not accurately descriptive; for both include rights, powers, privileges, and immunities, with their correlatives. Some of these legal relations are identical with some that existed prior to the breach, and this is why it is better not to say that the "contract" is discharged. The injured party has a new right — to damages suffered by the breach; and the wrongdoer has the new correlative duty. But the wrongdoer's previous primary duty to perform specifically may still exist and will often be enforceable in equity or in *debt* at law. The injured party may still be privileged to perform his own part, and may still possess the power of thereby creating a duty in the wrongdoer. For example, see *Korman v. Trainer*, (1917) 258 Pa. 362; *Catholic F.M. Society v. Oussani*, (1915) 215 N.Y. 1; *Cape May R.E. Co. v. Henderson*, (1911) 231 Pa. 82.

a contract which is wholly executory have a right to something more than a performance of the contract when the time arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due.¹

(a) *General rule.* The renunciation of a contract by one of the parties before the time for performance has come, discharges the other, if he so choose, and entitles him at once to sue for a breach.

Hochster v. Delatour^a is the leading case upon this subject. A engaged X upon the 12th of April to enter into his service as courier and to accompany him upon a tour; the employment was to commence on the 1st of June, 1852. On the 11th of May A wrote to X to inform him that he should not require his services. X at once brought an action, although the time for performance had not arrived. The court held that he was entitled to do so.

The sense of the rule is very clearly stated by Cockburn, C.J., in a case^b which goes somewhat further than *Hochster v. Delatour*. In that case a time was fixed for performance, and before it arrived the defendant renounced the contract; but in *Frost v. Knight* performance was contingent upon an event which might not happen within the lifetime of the parties.

A promised to marry X upon his father's death, and during his father's lifetime renounced the contract; X was held entitled to sue upon the grounds explained above. "The promisee," said Cockburn, C.J., "has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. *In the meantime he has a right to have the contract kept open as a subsisting and effective contract.* Its unimpaired and unimpeached efficacy may be essential to his interests."^c

(b) *Limitations.* There are two limitations to this rule.

The first is that the renunciation must deal with the entire

^a (1852) 2 E. & B. 678.

^b *Frost v. Knight*, (1872) L.R. 7 Ex. 114.

^c (1872) L.R. 7 Ex. at p. 114.

¹ This means that he has a right that the other party shall not repudiate.

² *Kurtz v. Frank*, (1881) 76 Ind. 594; *Burtis v. Thompson*, (1870) 42 N.Y. 246.

Here again this means merely that one party has a right that the other shall not repudiate. It is a very inapt figure of speech to say that a contract must be "kept open." A contract is not a *door*.

performance to which the contract binds the promisor.¹ It is possible that the promisor might announce his intention of breaking so much, or so vital a part, of the contract as to entitle the promisee to treat his act as amounting in effect to a complete renunciation.^a But there is no case in which a partial renunciation has been treated as a breach by anticipation conferring an immediate right of action.

The second is that if the promisee refuses to accept the renunciation, and continues to insist on the performance (to which he still has a right) of the promise, the contract remains in existence for the benefit and at the risk of both parties, and if anything occur subsequently to discharge it from other causes, the promisor, whose renunciation has been refused, may nevertheless take advantage of such discharge.²

Thus in *Avery v. Bowden*,^b A agreed with X by charter-party that his ship should sail to Odessa, and there take a cargo from X's agent, which was to be loaded within a certain number of days. The vessel reached Odessa, and her master demanded a cargo, but X's agent refused to supply one. Although the days within which A was entitled to load the cargo had not expired, his agent, the master of the ship, might have treated this refusal as a breach of contract and sailed away. A would then have had an immediate right to damages for breach. But the master of the ship continued to demand a cargo, and before the running days were out — before therefore a breach by non-performance had

^a *Mersey Steel and Iron Co. v. Naylor*, (1884) 9 App. Cas. p. 442; *Rhymney Railway Co. v. Brecon Railway Co.*, (1900) 69 L.J. Ch. 813.

^b (1856) 5 E. & B. 714.

¹ Thus, where a lessor announces his intention of not rebuilding as he had agreed, the lessee is not privileged to abandon the lease. *Johnstone v. Milling*, (1886) 16 Q.B.D. 460.

² *Kadiash v. Young*, (1883) 108 Ill. 170; *Roebling's Sons' Co. v. Fence Co.*, (1889) 130 Ill. 660; *Stanford v. McGill*, (1897) 6 N.Dak. 536. Explanation is needed of the statement that "the contract remains in existence." Of course the original *acts* of offer and acceptance have gone into history and remain unchanged. The *document*, if there is one, is also unaffected by a repudiation. The *legal relations* of the parties, however, are gravely affected by the new operative fact called renunciation. These are set out in § 385, *infra*. It is true that if the one party does not "accept" the other's renunciation as final, his rights may be discharged by subsequent impossibility; but it is not true that in such case the legal relations of the parties are the same as before the renunciation.

The implied analogy between a renunciation and an offer to rescind is not sound; the breach is complete when the renunciation is posted and the place of posting is the place of breach. *Holland v. Bennett*, (1902) 1 K.B. 867; *Wester v. Casein Co.*, (1912) 206 N.Y. 506.

occurred — a war broke out between England and Russia, and the performance of the contract became legally impossible. Afterwards *A* sued for breach of the charter-party, but it was held that as there had been no actual failure of performance before the war broke out (for the running days had not then expired), and as *the agent had not accepted the renunciation as a breach*, *X* was entitled to take advantage of the discharge of the contract brought about by the declaration of war.^a

384. Renunciation during performance.¹ If during the performance of a contract one of the parties by word or act definitely refuses to continue to perform his part, the other party is forthwith exonerated from any further performance of his promise, and is at once entitled to bring his action.²

In *Cort v. The Ambergate Railway Company*,^b Cort contracted with the defendant company to supply them with 3900 tons of railway chairs at a certain price, to be delivered in certain quantities at specified dates. After 1787 tons had been delivered, the company desired Cort to deliver no more, as they would not be wanted. He brought an action upon the contract, averring readiness and willingness to perform his part, and that he had been prevented from doing so by the company. He obtained a verdict, and when the company moved for a new trial on the ground that Cort should have proved not merely readiness and willingness to deliver, but an actual delivery, the court held that where a contract was renounced by one of the parties the other need only show that he was willing to have performed his part.

"When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract."^c

^a *Avery v. Bowden*, (1856) 5 E. & B. 714.

^b (1851) 17 Q.B. 127.

^c At p. 148.

¹ See § 386, *infra*.

² *Hale v. Trout*, (1868) 35 Cal. 229; *Connolly v. Sullivan*, (1899) 173 Mass. 1; *Derby v. Johnson*, (1848) 21 Vt. 17; *United States v. Behan*, (1884) 110 U.S. 338; *Lake Shore &c. Ry. v. Richards*, (1894) 152 Ill. 59; *Cutter v. Gillette*, (1895) 163 Mass. 95.

³ *Canda v. Wick*, (1885) 100 N.Y. 127. Observe that the holding here is that the injured party's *right* to damages is not conditional upon further performance or tender thereof by himself.

So, too, in *General Bill-Posting Co. v. Atkinson*,^a the defendant contracted to serve the company and not to compete with them for a certain period after the termination of his engagement. The House of Lords held that he was no longer bound by his covenant not to compete, when the company had repudiated the contract on their side by wrongfully dismissing him without notice.¹

385. American note on anticipatory breach.² The rule laid down in *Hochster v. Delatour*³ is the prevailing rule in the United States⁴ although it has been criticised and is rejected in a few states.⁵ The rule seems never to have been applied to cases of commercial paper, although the reasons underlying the rule are equally applicable in those cases. No one supposes that the holder of a promissory note not yet due can sue on it merely because the debtor says he is not going to pay it. An attempt was made in *Roehm v. Horst*,⁶ to distinguish these cases on the ground that they are unilateral: "In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule." But this can hardly be maintained if the "reason of the rule" is that a repudiation injures the promisee; for the repudiation of a note tends to destroy its market value.

The reason given for the rule by Lord Chief Justice Campbell in *Hochster v. Delatour* is that unless the plaintiff is allowed to

^a [1909] A.C. 118.

¹ This holds that the injured party is discharged from his previous conditional duty not to compete.

² Sections 385 and 386 are by the American editor.

³ (1852) 2 El. & Bl. 678.

⁴ *Roehm v. Horst*, (1900) 178 U.S. 1; *Central Trust Co. v. Chicago Auditorium Ass'n*, (1916) 240 U.S. 581; *Dingley v. Oler*, (1886) 117 U.S. 490; *Windmuller v. Pope*, (1887) 107 N.Y. 674; *Kurtz v. Frank*, (1881) 76 Ind. 594; *Fox v. Kitton*, (1858) 19 Ill. 519; *McCormick v. Basal*, (1877) 46 Iowa, 235; *Platt v. Brand*, (1872) 26 Mich. 173; *Kalkhoff v. Nelson*, (1895) 60 Minn. 284; *Hocking v. Hamilton*, (1893) 158 Pa. 107; *Listman v. Dufresne*, (1913) 111 Me. 104; *O'Neill v. Supreme Council*, (1904) 70 N.J. L. 410; *Hart-Parr Co. v. Finley*, (1915) 31 N.Dak. 130; *Churchill Co. v. Newton*, (1914) 88 Conn. 130 (*semble*); *Wester v. Casein Co.*, (1912) 206 N.Y. 506. See also notes in 1 Ann. Cas. 422; 12 Ann. Cas. 1108.

The rule has been applied in the case of an insolvent corporation in the hands of a receiver. *In re Neff*, (1907, C.C.A.) 157 Fed. 57; *Pennsylvania Steel Co. v. New York Ry. Co.*, (1912, C.C.A.) 198 Fed. 721.

⁵ *Daniels v. Newton*, (1874) 114 Mass. 530; *Porter v. Supreme Council*, (1903) 183 Mass. 326; *Carstens v. McDonald*, (1894) 38 Neb. 858; *King v. Waterman*, (1898) 55 Neb. 324 (*semble*); *Stanford v. McGill*, (1897) 6 N. Dak. 536 (overruled: see *supra*).

⁶ (1900) 178 U.S. 1.

treat the repudiation as a complete breach and to sue at once therefor, he will be under the necessity of remaining ready and willing to perform his own part. He says: "it is surely much more rational . . . that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue." This last statement is entirely correct, but it does not follow therefrom that the plaintiff should be allowed to sue *before the date fixed for performance* by the defendant. A repudiation clearly gives the other party the *privilege* or "liberty," of not performing his part and of not remaining ready and willing to perform. This is just and reasonable. Furthermore, he will certainly have a secondary *right* to damages if and when the threatened breach actually occurs. But it is perfectly easy to confer this *privilege* and this conditional *future right* upon the injured party, without at the same time creating in him an *immediate right* to damages that may never occur. If the reason for giving him this immediate right of action is that otherwise he could not have the *privilege* of not performing his own part, then it is true that the rule would not apply to unilateral money debts or to any other unilateral contract; for in these cases the promisee has already fully performed and is already privileged to do nothing further.

The best reasons for allowing an immediate action for an anticipatory repudiation are that it frequently causes immediate loss in property values, it disturbs the mind and serenity of the promisee, and an immediate action makes for an early settlement of the dispute and a timely payment of damages. There has never been any authority for declaring the repudiation to be a tort.

The chief objection to the rule seems to be that it advances the time of trial so that in rare instances the plaintiff might recover a judgment for damages that later developments show that he does not suffer. This is not a very strong objection; it is an objection that applies to all future damages, and yet the recovery of such damages is necessary and desirable.¹ In view of the existing authorities and the very general approval of the doctrine, it seems no longer worth while to attack it.

An anticipatory repudiation, therefore, is an operative fact and it may be said to have the following legal results:

¹ See *Parker v. Russell*, (1882) 133 Mass. 74; *R. H. White Co. v. Remick*, (1908) 198 Mass. 41.

(1) It suspends the other party's duty of further performance.¹

(2) It causes the other party's secondary rights to damages or to restitution to be no longer conditional on performance or tender thereof by himself.²

(3) It creates in the injured party an immediate secondary right to restitution in so far as he has already conferred value upon the repudiator.³

(4) It terminates the other party's power to create a future right to collect the full contract price in an action of *debt*, in cases where further performance by himself will increase the loss.⁴

(5) The repudiator has the power of retraction prior to any change of position by the other party, but not afterwards.⁵

(6) It creates an immediate right of action in express *assumpsit* for damages, provided the following requirements are fulfilled: The repudiation must be positive, absolute, and total, or at least go to the essence;⁶ it must be communicated to the other party;⁷ and the other party must have accepted it as final,

¹ *General Bill-Posting Co. v. Atkinson*, (1909) A.C. 118. See also cases in the other notes under this section, in all of which this principle is assumed as correct.

² *Ripley v. McClure*, (1849) 4 Exch. 345; *Cort v. Ambergate Ry. Co.*, (1851) 17 Q.B. 127; *Daniels v. Newton*, (1874) 114 Mass. 530 (*semble*).

³ *Ballou v. Billings*, (1884) 136 Mass. 307; *Hosmer v. Wilson*, (1859) 7 Mich. 294 (*semble*); *Elder v. Chapman*, (1898) 176 Ill. 142; *Ryan v. Dayton*, (1856) 25 Conn. 188. This right is generally classified as quasi-contractual, but it is one of the alternative secondary rights for breach of contract. It is a *debt* measured by the *quid pro quo* received by the defendant. Cf. *Pittman v. Pittman*, (1901) 22 Ky. L.R. 1751, 61 S.W. 461.

⁴ *Clark v. Marsiglia*, (1845, N.Y.) 1 Denio, 317; *Collyer v. Moulton*, (1868) 9 R.I. 90; *Maynard v. Corset Co.*, (1908) 200 Mass. 1; *Gibbons v. Bente*, (1892) 51 Minn. 499; *McCargo v. Jergens*, (1912) 206 N.Y. 363, 372; *Emmens v. Elderton*, (1853) 4 H.L.C. 624; *Smith v. Hayward*, (1837) 7 A. & E. 544; *Wigent v. Marra*, (1902) 130 Mich. 609; *Hosmer v. Wilson*, (1859) 7 Mich. 294 (*semble*); *Davis v. Bronson*, (1891) 2 N.Dak. 300; *Tufts v. Lawrence & Co.*, (1890) 77 Tex. 526; *American Pub. Co. v. Walker*, (1901) 87 Mo. App. 503. See 51 L.R.A. (N.S.) 735, note.

Cf. *John A. Roebling's Sons' Co. v. Lock Stitch Fence Co.*, (1889) 130 Ill. 660.

⁵ *Ripley v. McClure*, (1849) 4 Exch. 345; *Rayburn v. Comstock*, (1890) 80 Mich. 448; *Nilson v. Morse*, (1881) 62 Wis. 240.

⁶ *Dingley v. Oler*, (1886) 117 U.S. 490; *Johnstone v. Milling*, (1886) 16 Q.B.D. 460.

⁷ *Traver v. Halsted*, (1840, N.Y.) 23 Wend. 66. But the place of breach is the place where a written renunciation was posted. *Holland v. Bennett*, (1902) 1 K.B. 867; *Wester v. Cassin Co.*, (1912) 206 N.Y. 506.

or at least have done nothing to indicate that he would disregard it.¹

386. American note, cont. — Time of repudiation. It is probable that in the United States there is no difference in legal effect between repudiation before the time set for performance and repudiation after that time. A *total repudiation* by *A*, i.e., an unconditional refusal by *A* to perform the acts required by his duty, always justifies *B* in refraining from going on with performance on his part; and this is true whether *B* has begun his performance or not. This means that *B* is discharged from his previous legal *duty* to perform; he is *privileged* not to perform. In both cases also *B* remains *privileged* to go on performing, except where his acts of performance would be tortious (e.g., where performance involves *B*'s dealing with *A*'s real or personal property, in which case *B*'s license or privilege to perform may be destroyed by *A*'s repudiation).² In like manner *B*'s immediate *right* to damages does not depend upon whether *A* repudiates prior to the time set for his performance or afterwards. According to the overwhelming weight of authority, *B* has such an immediate right in either case.³

In spite of a total repudiation by *A*, does *B* still have the *power* to create a right to full payment on the part of *A* by going ahead and performing his own part? The answer will nearly always be in the negative, where continuing performance will increase *B*'s loss and enlarge the damages to be charged against *A*. *B* does not have this power, irrespective of the time of *A*'s repudiation. Suppose *B* has contracted to render personal service to *A*, as in *Hochster v. Delatour*. It was decided in some cases that in spite of *A*'s repudiation *B* might continue to tender his service and then maintain an action of *debt* or *indebitatus assumpsit* for the full contract wage.⁴ The great weight of author-

¹ *Zuck v. McClure*, (1881) 98 Pa. 541; *Traver v. Halsted*, *supra*; *Dingley v. Oler*, *supra*; *Nilson v. Morse*, *supra*.

² Observe that the exercise of this *privilege* to go on performing does not necessarily increase the extent of his *rights* against the repudiator.

³ See preceding section.

⁴ *Gandell v. Pontigny*, (1816) 4 Camp. 375; *Little v. Mercer*, (1845) 9 Mo. 218:

It has been said that the plaintiff can maintain *debt* for the full wage on the theory that he has rendered "constructive service." Such a fiction is not to be tolerated. Debt should be maintainable only in case our prevailing *mores* justify the injured party in having both his time and his wages, and at present they do not.

ity is now otherwise,¹ and *B*'s only remedies are in quasi-contract for *quantum meruit* (if he has already rendered service) or in *express assumpsit* for damages measured by the agreed wage minus the reasonable value to himself of the time and labor saved by reason of *A*'s repudiation.²

If *A* has agreed to buy goods of *B* and later repudiates, it is provided by the Uniform Sales Act³ that *B* may nevertheless convey title to *A* and then sue in *debt* for the full price if the goods are such as cannot readily be resold. This is no doubt due mainly to the fact that such further performance by *B* does not increase his loss. In any case, he was entitled to the agreed price minus the market value of the goods; and now that market value is put into the buyer's hands to be accounted for, thus making it unnecessary to determine what that market value is. If at the time of *A*'s repudiation the goods were still in an unfinished state, and their completion would increase the loss, the foregoing remedy is not open to *B*.⁴

Sometimes it is said that in case of repudiation by *A* after the time for performance by *B* has arrived it is the latter's *duty* to mitigate damages by stopping work and by getting other work of a like character. But, in spite of many statements of this sort, there is no such duty. He is privileged to remain idle if he pleases. The rule operates not to create a duty in *B*, but merely to destroy his power to create a right against *A*. He has and can obtain "no-right" against *A* for any sum beyond the contract price minus the value he saves by not performing further. If the time for *B*'s performance has arrived when *A* repudiates, this rule operates so as to make it advisable for *B* to look for other work so as to avoid *loss to himself*. It should have the same operation where *A*'s repudiation is prior to the time for performance by *B*, but there have been *dicta* to the contrary.

¹ *Clark v. Marsiglia*, (1845, N.Y.) 1 Denio, 317; *Doherty v. Schipper*, (1911) 250 Ill. 128; and other cases cited in the preceding section.

Of course, where the defendant's promise was totally independent, it is immaterial whether the plaintiff performs or does not perform his part; he recovers the total amount promised in either case. *International Text Book Co. v. Martin*, (1915) 221 Mass. 1.

² See the preceding section, and also, *post*, § 401 *et seq.*

³ American Uniform Sales Act, § 63 (3). This probably represents the weight of authority even where the Sales Act has not been adopted. *Williston, Sales*, § 562. *Dustan v. McAndrew*, (1870) 44 N.Y. 72; *Home Pattern Co. v. Mertz*, (1914) 88 Conn. 22. See 51 L.R.A. (N.S.) 735, note.

⁴ *Hart-Parr Co. v. Finley*, (1915) 31 N.Dak. 130.

2. *Impossibility created by the act of one party to the contract*

Here also the impossibility may be created either before performance is due or in the course of performance.

387. Impossibility created before performance is due. If A, before the time for performance arrives, make it impossible that he should perform his promise, the effect is the same as though he had renounced the contract.¹

A promised to assign to X, within seven years from the date of the promise, all his interest in a lease. Before the end of seven years A assigned his whole interest to another person. It was held that X need not wait until the end of seven years to bring his action.

"The plaintiff has a right to say to the defendant, You have placed yourself in a situation in which you cannot perform what you have promised; you promised to be ready during the period of seven years, and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but if I now were to tender you the money, you would not be ready; this is a breach of the contract." ^a

388. Impossibility created during performance. The rule of law is similar in cases where one party during performance has by his own act made the complete performance of the contract impossible.²

An Englishman was engaged by the captain of a war-ship owned by the Japanese government to act as fireman on a voyage from the Tyne to Yokohama. In the course of the voyage the Japanese government declared war with China, and the Englishman was informed that a performance of the contract would bring him under the penalties of the Foreign Enlistment Act. It was held that he was entitled to leave the ship and sue for the wages agreed upon, since the act of the Japanese government had made his performance of the contract legally impossible.^b

The later case of *Ogdens Ltd. v. Nelson* ^c is a further authority

^a *Lovelock v. Franklyn*, (1846) 8 Q.B. 371.

^b *O'Neil v. Armstrong*, [1895] 2 Q.B. 418.

^c [1905] A.C. 109.

¹ *Sir Anthony Mayne's Case*, (1596) 5 Co. Rep. 20b; *Central Trust Co. v. Chicago Auditorium Ass'n*, (1916) 240 U.S. 581 (bankruptcy); *Re Mullings Clo. Co.*, (1917, C.C.A.) 238 Fed. 58 (same); *Delamater v. Miller*, (1823, N.Y.) 1 Cow. 75; *James v. Burchell*, (1880) 82 N.Y. 108; *Meyers v. Markham*, (1903) 90 Minn. 230.

² *Woodberry v. Warner*, (1890) 53 Ark. 488; *Chicago v. Tilley*, (1880) 103 U.S. 146; *Western Union Tel. Co. v. Semmes*, (1890) 73 Md. 9; *Fitts & Co. v. Reinhart*, (1897) 102 Iowa, 311.

for the proposition that where there is an express promise to do a certain thing for a certain time, the promisor, if he puts it out of his power to continue performance of his promise, is immediately liable to an action for loss sustained.

3. *Failure of performance*

389. Breach of conditional and of independent promises. When one party to a contract declares that he will not perform his part, or so acts as to make it impossible for him to do so, he thereby releases the other from the contract and its obligations. One of two parties is not required to tender performance when the other has by act or word indicated that he will not or cannot accept it, or will not or cannot do that in return for which the performance was promised.

But one of the parties may claim that though he has broken his promise wholly or in part the contract is not thereby brought to an end nor the other party discharged from his duties and liabilities. We have then to ascertain whether the promise of the party injured was given conditionally on the performance by the other of that in which he has made default. If it was, he is discharged: if it was not, he must perform as promised, and bring an action for the damage occasioned by the default of the other.

Herein lies the difference between promises that are independent of one another and promises that are interdependent; that is, so intimately connected with one another that the duty of performance by one party is *conditional* upon performance by the other.

Conditions concurrent. If *A* and *X* agree that the performance of their respective promises shall be simultaneous, or at least that each shall be ready and willing to perform his promise at the same time, then the duty of each promisor is conditional on this concurrence of readiness and willingness to perform; the conditions are *concurrent*. Thus in a sale of goods where no time is fixed for payment, the buyer must be ready to pay and the seller ready to deliver at one and the same time. The promises are interdependent and conditional upon each other, so that if *A* fails to deliver *X* may not only sue for damages but may also refuse to pay.

Conditions precedent. A contract may be divisible, and may consist of promises to do a number of successive acts. It is thus capable not only of complete performance, but of performance in part to a greater or less degree. A failure by *X* to perform any

part would give a right of action to *A*; but it would not necessarily discharge *A* from the performance of his own obligations under the contract. We have to inquire therefore what degree of failure by *X* will entitle *A* to say that the consideration for which he made his promise has in effect wholly failed and that he will not, and is not bound to, perform that which he had undertaken to perform.

A may promise *X* that he will do or pay something in consideration that *X* on his part promises to do or pay something; and they may both agree that the act or payment of *X* is to be a vital fact or "condition" going to the root of the contract. The duty of performance by *A* of his part of the bargain is in that case conditional on the *prior* act or payment of *X*. Thus, if *X* fails to do what he has promised, not only can *A* sue him for breach of contract, but since his promise is conditional on the performance by *X* of his undertaking, *A* is *discharged* from doing or paying that which he had promised.

The contract may be made up of several terms of varying importance; and it is then necessary to inquire which, if any, is considered by the parties as vital to the contract. In other words, we must ascertain, as a matter of construction, whether the term that has been broken is to be regarded as a "Condition" or as a "Warranty."

We may now discuss these matters in greater detail.

(a) *Independent and dependent promises distinguished*

390. Absolute or independent promises. An independent or absolute promise means a promise made by *A* to *X* in consideration of a promise made by *X* to *A*, and in such a manner that the total failure in the performance of one promise does not discharge the other promisor. He must perform as he has promised and may bring an action for such loss as he has sustained by the breach of the promise made to him.¹

¹ Promises may be absolutely independent so that either party may sue although he is himself in default. *International Text Book Co. v. Martin*, (1915) 221 Mass. 1; *Tracy v. Albany Exchange Co.*, (1852) 7 N.Y. 472; *Hamilton v. Home Ins. Co.*, (1890) 137 U.S. 370, *Philadelphia &c. Co. v. Howard*, (1851, U.S.) 13 How. 307; *De Kay v. Bliss*, (1890) 120 N.Y. 91.

The performance of one promise may be a condition precedent to the duty of immediate performance of the other, and the first may therefore be enforced as an independent promise. *Northrup v. Northrup*, (1826, N.Y.) 6 Cow. 296; *McRaven v. Crisler*, (1876) 53 Miss. 542; *Loud v. Pomona &c. Co.*, (1893) 153 U.S. 564.

Where payments are by installments and a deed is to be delivered when

We may take an illustration from a case of the year 1649:

"Ware brought an action of debt for £500 against Chappell upon an indenture of covenants between them, viz. that Ware should raise 500 soldiers and bring them to such a port, and that Chappell should find shipping and victuals for them to transport them to Galicia; and for not providing the shipping and victuals at the time appointed was the action brought. The defendant pleaded that the plaintiff had not raised the soldiers at that time; and to this plea the plaintiff demurs. Rolle, C.J., held that there was no condition precedent, but that they are distinct and mutual covenants, and that there may be several actions brought for them: and it is not necessary to give notice of the number of men raised, for the number is known to be 500; and the time for the shipping is also known by the covenants; and you have your remedy against him if he raise not the men: as he hath against you for not providing the shipping."^a

By the words "several actions" is meant that the breach of either covenant was a separate cause of action, each being an absolute promise, independent of the other.

Modern decisions incline against the construction of promises as independent of one another. Where a time is definitely fixed for the performance of one promise and no date assigned for the performance by the other — if *A* and *X* agree that *A* will buy *X*'s property and pay for it on a certain day and no day is fixed for the conveyance by *X* — then *X* may bring his action in default of payment on the day named, and need not aver that he has conveyed or offered to convey the lands.^{b 1} On the whole it is safe to say that, in the absence of clear indications to the contrary, promises, each of which forms the whole consideration for the other, will be held to create duties that are concur-

^a *Ware v. Chappell*, (1649) *Style*, 186. ^b *Mattock v. Kinglake*, (1839) 10 *A. & E.* 50.

all installments are paid, each installment may be enforced as an independent promise. *Kane v. Hood*, (1832, *Mass.*) 13 *Pick.* 281; *Paine v. Brown*, (1867) 37 *N.Y.* 228. But some courts hold payment of the last installment, and also of prior ones unpaid when the last one falls due, to be a condition concurrent with the delivery of the deed. *Hill v. Grigsby*, (1868) 35 *Cal.* 656; *Beecher v. Conradt*, (1855) 13 *N.Y.* 108; *Eddy v. Davis*, (1889) 116 *N.Y.* 247; *Irwin v. Lee*, (1870) 34 *Ind.* 319; *Soper v. Gabe*, (1895) 55 *Kans.* 646. Other courts hold payment of the last installment to be concurrent with the delivery of the deed, but not payment of prior unpaid installments. *Sheeren v. Moses*, (1877) 84 *Ill.* 448; *Bowen v. Bailey*, (1869) 42 *Miss.* 405.

¹ This is in accord with the rule constructed by Serjeant Williams in his note to *Pordage v. Cole*, (1669) 1 *Wms. Saunders*, 319, and the decision in that case is authority for it. It is believed, however, that in the absence of some expression of a contrary intention the courts would now infer that the conveyance by *X* was to be concurrent with payment by *A* and the promises would be dependent.

rently conditional — the antithesis of absolute or independent promises.¹

391. Dependent promises. In the contract for the sale of goods, the rule of common law, now embodied in the Sale of Goods Act,^a was that, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions.

Morton agreed to buy a certain quantity of corn from Lamb at a fixed price, the corn to be delivered in one month. It was not delivered, and Morton sued for damages, alleging that he had been always ready and willing to *receive* the corn. But the court held that this was not enough to make a cause of action. He should have alleged that he was always ready and willing to *pay* for the corn; he might, for aught that appeared on the pleadings, have discharged the defendant by his non-readiness to pay.^b

Thus Bayley, J., in *Bloxam v. Sanders*,^c says:

“Where goods are sold, and nothing is said as to the time of the delivery or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price.”⁴

(b) *Installment contracts: effect of a partial failure of performance*

392. Divisible promises.⁵ We now come to cases in which it is alleged by one party to a contract that he is discharged from the

^a 56 & 57 Vict. c. 71, § 28.

^b *Morton v. Lamb*, (1797) 7 T.R. 125.

^c (1825) 4 B. & C. 941, at p. 948.

¹ Whether promises are dependent or independent is generally described as a question of intention to be gathered from a consideration of the whole contract. *Loud v. Pomona Land Co.*, (1893) 153 U.S. 564; *Brusie v. Peck Bros.*, (1893) 14 U.S. App. 21; *Griggs v. Moors*, (1897) 168 Mass. 354. This often resolves itself into a question of what now seems fair and just to the court in the light of subsequent events.

² American Uniform Sales Act, § 42.

³ *Dunham v. Pettee*, (1853) 8 N.Y. 508. But upon demand of goods and refusal to deliver, an actual tender of the price is not necessary where it would be an idle ceremony. *Wheeler v. Garcia*, (1869) 40 N.Y. 584.

⁴ *Tipton v. Feitner*, (1859) 20 N.Y. 423; *Allen v. Hartfield*, (1875) 76 Ill. 358; *Hapgood v. Shaw*, (1870) 105 Mass. 276.

⁵ Some difficulty has been made of the distinction between contracts that are said to be *divisible* and those that are said to be *entire*. Where the history of the transactions between two parties shows that there have been two distinct offers and two separate acceptances there are two separate and independent contracts; and, in general, neither party is privileged to fail in performing in accordance with one contract merely because the

performance of his part by the fact that the other party has failed to do his, either wholly or to such an extent as to defeat the objects for which the contract was made.

It is plain that a total failure by *A* to do that which was the entire consideration for the promise of *X*, and which should have been done before the performance of *X*'s promise fell due, will exonerate *X*. But it may be that *A* has done something, though not all that he promised; or the performance of a contract may extend over a considerable time during which something has to be done by both parties, as in the case of delivery of goods and payment of their price by installments. Here we deal with questions of degree. Has one party so far made default that the consideration for which the other gave his promise has in effect wholly failed?

393. Delivery and payment by installments. The best illustrations of divisible promises are to be found in contracts to receive and pay for goods by installments. Where these installments are numerous, and extend over a long time, a default

opposite party has failed in the case of the other contract. See *Ebling v. Ebling*, (1913) 176 Mich. 602; *Hanson v. Wittenberg*, (1910) 205 Mass. 319.

In the case of a single bilateral contract the terms may be such that one party must perform fully (or tender such performance) before the other party is under a duty to perform anything. *Baker v. Higgins*, (1860) 21 N.Y. 397; *Kelly Const. Co. v. Hackensack Brick Co.*, (1918, N.J.) 103 Atl. 417. Such a contract is said to be *entire*. On the other hand, it may be provided that *A* must pay a part of the price at the completion of a specified part performance by *B*. In such case, non-payment of an installment by *A* is certainly a breach of contract for which *B* can maintain *assumpsit* for damages. *B* should be able to maintain *debt* for the agreed sum in case the part performance by *B* was agreed upon as the legal equivalent (*quid pro quo*) of the part of the price to be paid by *A*. It is then often held that *A*'s duty to pay is not affected by *B*'s subsequent non-performance. See *Leonard v. Dyer*, (1857) 26 Conn. 172; *Snook v. Fries*, (1854, N.Y.) 19 Barb. 313; *Ming v. Corbin*, (1894) 142 N.Y. 334; *Gill v. Lumber Co.*, (1892) 151 Pa. 534; *Barnes v. Leidigh*, (1905) 46 Or. 43; *Wooten v. Walters*, (1892) 110 N.C. 251. This contract, therefore, is called *divisible*.

On the other hand it is quite possible for *A*'s duty to pay to be constructively conditional upon the continued willingness and ability of *B* to perform the balance, and *B*'s duty to perform the balance may be conditional upon payment by *A* of the first installment. Such a contract has been described as *entire* to express the idea that it is thus conditional, but the description is not well-chosen. See *Rugg v. Moore*, (1885) 110 Pa. 236. In *Mersey Steel & I. Co. v. Naylor*, (1884) 9 App. Cas. 434, where it was held that the seller's duty to deliver a second installment was not conditional upon prompt payment by the buyer for the first installment, the contract was described as *entire* to show that the defendant's duty was unconditional. The term is equally ill-chosen here. The terms "*entire*" and "*divisible*" are of no service in determining whether contractual duties are conditional or otherwise.

either of delivery or payment does not necessarily discharge the contract, though it must of course in every case give rise to an action for damages.

In *Simpson v. Crippin*^a it was agreed that 6000 to 8000 tons of coal should be delivered in twelve monthly installments, the buyer to send wagons to receive them: the buyer sent wagons for only 158 tons in the first month, but the seller was not held entitled to rescind the contract.

In *Freeth v. Burr*^b there was a failure to pay for one installment of several deliveries of iron, under an erroneous impression on the part of the buyer that he was entitled to withhold payment as a set-off against damages for non-delivery of an earlier installment. In the *Mersey Steel and Iron Co. v. Naylor*^c there was a similar failure to pay for an installment under an impression that the appellant company having gone into liquidation there was no one to whom payment could safely be made when the installment fell due. In neither case was the seller held entitled to repudiate the contract by reason of the default.

On the other hand, where iron was to be delivered in four monthly installments of about 150 tons each, a failure to deliver more than 21 tons in the first month was held to discharge the buyer.^d

Again, where 2000 tons of iron were to be delivered in three monthly installments, failure to accept any during the first month discharged the seller.^e

But the question of degree may appear in other forms. In a charter-party containing a promise to load a *complete* cargo the contract is not necessarily discharged because the cargo loaded is not complete.^f

Again, a term in a charter-party that a ship should arrive at a certain place at a certain day, or should use all due diligence to arrive as soon as possible, is one which admits of greater or less failure in performance, and according to the circumstances such failure may or may not discharge the charterer.^g

The question to be answered in all these cases is one of fact; the answer must depend on the circumstances of each case.^h The question assumes one of two forms — does the failure of performance amount in effect to a renunciation on his part who

^a (1872) L.R. 8 Q.B. 14.

^c (1884) 9 App. Cas. 434.

^e *Honck v. Muller*, (1881) 7 Q.B.D. 92.

^g *Jackson v. Union M. Ins. Co.*, (1874) L.R. 10 C.P. 148.

^b (1874) L.R. 9 C.P. 208.

^d *Hoare v. Rennie*, (1859) 5 H. & N. 19.

^f *Ritchie v. Atkinson*, (1808) 10 East, 308.

^h This is substantially the mode in which the legislature has stated the problem in the Sale of Goods Act, § 31. See Chalmers, *Sale of Goods Act* (7th ed.), pp. 87-89.

makes default? or does it go so far to the root of the contract as to entitle the other to say, "I have lost all that I cared to obtain under this contract; further performance cannot make good the past default"? ¹

The answer to the question may be provided by the parties themselves. The party who makes the default may so act as to

¹ Installment contracts do not differ from other contracts as to the effect of an absolute and total renunciation. See discussion of that subject *ante*, § 383. In the absence of such a renunciation it is seldom easy to determine exactly how prompt and complete must be the performance by *A* of his early installments in order that *B* will not be privileged to refuse to perform. In many cases the courts have tried to construct some definite rule capable of a sort of mechanical application to facts. By such means they produce an "illusion of certainty." [See Mr. Justice Holmes in "The Path of the Law," 10 *Harvard Law Review*, 466.]

Such a rule is "In contracts of merchants time is of the essence." *Norrington v. Wright*, (1885) 115 U.S. 188. The question of *B*'s privilege not to perform should turn rather upon the extent of the damage that *A*'s partial non-performance will cause or appears reasonably likely to cause when observed at the time and place that *B*'s duty to act had to be determined.

It is now the very general rule that the failure by a seller of goods to ship or to deliver the first installment *substantially* as agreed is the non-fulfillment of a condition precedent to the buyer's duty to receive the goods or to pay the price. *Norrington v. Wright*, (1885) 115 U.S. 188 (reviewing many cases); *Hoare v. Rennie*, (1859) 5 H. & N. 19; *King Philip Mills v. Slater*, (1878) 12 R.I. 82; *Pope v. Porter*, (1886) 102 N.Y. 366. *Contra*: *Gerli v. Poidebard Silk Mfg. Co.*, (1894) 57 N.J. L. 432; and see *Myer v. Wheeler*, (1884) 65 Iowa, 390.

In the United States the same effect is generally given to a failure by the buyer to pay an installment of the price substantially as agreed. *Phillips v. Seymour*, (1875) 91 U.S. 646; *Graf v. Cunningham*, (1888) 109 N.Y. 369; *Thomas v. Stewart*, (1892) 132 N.Y. 580; *Kokomo Strawboard Co. v. Inman*, (1892) 134 N.Y. 92; *Rugg v. Moore*, (1885) 110 Pa. 236; *Hess v. Dawson*, (1894) 149 Ill. 138. *Contra*, *Blackburn v. Reilly*, (1885) 47 N.J. L. 290. The English cases cited above in the text appear likewise to be *contra*, but a reasonable distinction is possible. In *Freeth v. Burr*, the seller had himself committed the first breach; in *Mersey Steel & I. Co. v. Naylor* the buyer's non-payment was due to doubt as to the person to whom the money was payable; while in *Simpson v. Crippin* the buyer's default did not cause the seller to extend a credit not agreed upon, for the seller was left in possession of the goods. Where the buyer's non-payment forces extended credit from the seller and is accompanied by other facts that justify the seller in fearing that he will not be paid at all, he is privileged to stop further deliveries. See *Rugg v. Moore*, *supra*.

Some cases have held that if the seller elects to make no further deliveries his only secondary right is for the reasonable value of the goods delivered, for which he can sue in *indebitatus assumpsit*, and that he has no right to recover his expected profits on the entire contract. Thus a milder effect is given to a non-payment than to a non-delivery. See *Wharton v. Winch*, (1893) 140 N.Y. 287; *Keeler v. Clifford*, (1897) 165 Ill. 544; *Beatty v. Howe Lumber Co.*, (1899) 77 Minn. 272.

leave no doubt that he will not or cannot carry out the contract according to its terms.^{a 1}

Or again, the parties may expressly agree that though the promises on both sides are in their nature divisible, nothing shall be paid on one side until after entire performance has taken place on the other. In such case the courts are relieved of the task of interpretation.^b

But if the parties have not provided an answer, we come back to the question of fact; was the breach so substantial as to go to the root of the whole contract; or, at any rate, was it such that an intention to repudiate the contract may be inferred from it. The rule was stated very clearly by Bigham, J., in *Millar's Karri Co. v. Weddel*,^c a case of a contract to deliver by installments:

"If the breach is of such a kind or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If for instance a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what will happen; he can at once cancel the contract and rid himself of the difficulty."²

(c) *Conditions and warranties*

394. **Vital and non-vital terms.** We have now dealt with promises which admit of more or less complete performance; when default is made on one side, the courts must determine whether or no that default amounts to a renunciation of the contract by the party making it, or so frustrates the objects of the contract as to discharge the party injured from his duties and liabilities.

But contracts are often made up of various statements and promises on both sides, differing in character and in importance;

^a *Withers v. Reynolds*, (1831) 2 B. & A. 882; *Bloomer v. Bernstein*, (1874) L.R. 9 C.P. 588.
^b *Cutter v. Powell*, (1795) 6 T.R. 320. ^c (1909) 100 L.T. 128.

¹ *Gibney v. Curtis*, (1883) 61 Md. 192; *Bollman v. Burt*, (1883) 61 Md. 415.

² The non-performance in relation to the early installment *may* be so damaging to the other party as to justify him in refusing to perform his part, even though the first party is ready to perform the rest of the contract properly.

the parties may regard some of these as vital, others as subsidiary, or collateral to the main purpose of the contract. Where one of these is broken the court must discover, from the tenor of the contract or the expressed intention of the parties, whether the broken term was vital or not.

If the parties regarded the term as essential, fulfillment thereof is a condition: its failure prevents any duty of performance by the other party. If they did not regard it as essential, it is a warranty or something of even less importance: its failure can give rise to an action for such damages as have been sustained by the failure of that particular term.

395. **Vital terms creating conditions.** Bearing in mind that a term creating a condition may take the form either of a statement or of a promise, we find an illustration of the former in *Behn v. Burness*,^a where a ship was stated in the contract of charter-party to be "now in the port of Amsterdam," and the fact that the ship was not in that port at the date of the contract discharged the charterer.¹

The second kind of condition is illustrated by the case of *Glaholm v. Hays*.^b A vessel was chartered to go from England to Trieste and there load a cargo, and the charter-party contained this clause: "the vessel to sail from England on or before the 4th day of February next." The vessel did not sail for some days after the 4th of February, and on its arrival at Trieste the charterer refused to load a cargo and repudiated the contract. The judgment of the court was thus expressed:

"Whether a particular clause in a charter-party shall be held to be a condition upon the non-performance of which by the one party the other is at liberty to abandon the contract and consider it at an end, or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates. . . . Upon the whole, we think the intention of the parties to this contract sufficiently appears to have been, to insure the ship's sailing at latest by the 4th of February, and that the only mode of effecting this is by holding the clause in question to have been a condition precedent."^c

^a (1863) 3 B. & S. 751.

^b (1841) 2 M. & G. 257.

^c *Glaholm v. Hays*, (1841) 2 M. & G. 258.

¹ *Davison v. Von Lingen*, (1884) 113 U.S. 40. See *ante*, § 358, distinguishing condition and promise.

² *Lowber v. Bangs*, (1864, U.S.) 2 Wall. 728, where a promise that a vessel shall proceed "with all possible despatch" was held vital.

396. **Sale of goods.** The contract for the sale of goods furnishes further illustrations, though the matter is somewhat complicated by the distinction between the bargain and sale of specific goods and the executory contract of sale.

(1) *Failure of performance, where goods are not specific.* In the latter case, that is in a contract for the sale of goods which are not specific, the buyer may of course protect himself by express conditions precedent as to quality and fitness of the goods. But he is also protected by conditions implied by law which secure him, if he has been unable to inspect the goods, from being required to accept an article different to that which he bargained for, or practically worthless and unmarketable.^{a 1}

The common law on this subject has now been superseded by the Sale of Goods Act, §§ 13, 14. Where goods are sold by description there is an implied condition that they should correspond to the description;^{b 2} where they are bought for a particular purpose communicated by the buyer to the seller there is an implied condition that they are reasonably fit for that purpose:³ where the buyer has no opportunity of examining the goods there is an implied condition that they are of a merchantable quality.⁴

These "implied conditions"^c go to the root of the whole contract and their non-fulfillment prevents the buyer from being under obligation to take delivery of the goods.

(2) *Where the goods are specific.* Where specific goods are sold, that is to say, "goods identified and agreed upon at the time the contract of sale is made," the contract operates as a conveyance and the property passes at once to the buyer; he cannot thereafter reject the goods for non-conformity to the de-

^a Jones v. Just, (1868) L.R. 3 Q.B. 205.

^b Chalmers, Sale of Goods Act (7th ed.), pp. 40, 42. Where the sale is by sample and the contract contains a description of the article sold, the description and not the sample is the test of performance. If sample and description differ, the buyer may reject the goods, though they correspond with the sample if they do not correspond with the description. Nichol v. Godts, (1854) 10 Ex. 191.

^c This section of the Act has happily superseded the use, for this purpose, of the term "implied warranty," a use long ago emphatically condemned by Lord Abinger, Chanter v. Hopkins, (1838) 4 M. & W. 404, though it survived till 1894, to the confusion of all terminology relating to the contract of sale. I have not thought it right to discuss the numerous cases which illustrate the interpretation of this section. They are really a part of the law of sale of goods.

¹ Pope v. Allis, (1885) 115 U.S. 363.

² Pope v. Allis, *supra*; Bach v. Levy, (1886) 101 N.Y. 511.

³ Kellogg Bridge Co. v. Hamilton, (1884) 110 U.S. 108; Rodgers v. Niles, (1860) 11 Ohio St. 48.

⁴ Murchie v. Cornell, (1891) 155 Mass. 60; English v. Spokane Comm. Co., (1893) 57 Fed. 451.

scription given at the time of sale.¹ He is left to obtain such damages as he may have suffered by the seller's default; and this, if the goods should prove wholly valueless, may of course represent the whole amount of the price paid.^a

The position of the buyer is the same if he has accepted goods which at the time of the sale were not specific, and which he might therefore have rejected if their worthlessness had been apparent. Such would be the case of seed sold as "new growing seed," which turned out wholly unproductive when sown. The buyer in such a case was held entitled to recover the whole price as damages.^{b 2}

Where therefore the property in the goods has not passed to the buyer and the contract is still executory he is *discharged* by failure of any of the "implied conditions." He may reject the goods, and may further bring an action for such damage as he has sustained.³

Where the property in the goods has passed to the buyer he is not *discharged* though the goods turn out to be worthless; he must keep the goods, but he may bring an action for money paid under the contract in so far as it is in excess of the value of the goods, and for any further damage occasioned by the breach of warranty.^{c 4}

^a 56 & 57 Viet. c. 71, § 53. *Bostock v. Nicholson*, [1904] 1 K.B. at p. 741.

^b *Poulton v. Lattimore*, (1829) 9 B. & C. 259.

^c *Street v. Blay*, (1831) 2 B. & A. 456.

¹ But see *contra* where no practicable examination at the time of the sale will disclose the true character of the article, *Hawkins v. Pemberton*, (1872) 51 N.Y. 198; *Henshaw v. Robins*, (1845, Mass.) 9 Met. 83; *Jones v. George*, (1884) 61 Tex. 345; *Wolcott v. Mount*, (1873) 36 N.J. L. 262.

² *Wolcott v. Mount*, *supra*.

³ *Taylor v. Saxe*, (1892) 134 N.Y. 67. He is under no duty to return the goods. *Starr v. Torrey*, (1849) 22 N.J. L. 190. Whether the buyer *must* reject the goods in order to take advantage of the breach of the condition, the American cases do not agree. It is held on the one hand that he has an election either to reject the goods and recover damages for breach of the contract to deliver, or to accept the goods and recover damages for the breach of the implied warranty. *Pope v. Allis*, *supra*; *English v. Spokane Comm. Co.*, (1893) 57 Fed. 451; *Wolcott v. Mount*, *supra*; *Morse v. Moore*, (1891) 83 Me. 473. On the other hand, it is held that the implied condition or warranty will not survive the acceptance of the goods. *Haase v. Nonnemacher*, (1875) 21 Minn. 486; *McClure v. Jefferson*, (1893) 85 Wis. 208. In New York an implied condition or warranty arising from sale by description will not survive acceptance. *Coplay Iron Co. v. Pope*, (1888) 108 N.Y. 232; though one arising from sale by sample will survive. *Zabriskie v. Central Vt. R.*, (1892) 131 N.Y. 72.

⁴ Whether upon breach of an *express* warranty in an executed sale the buyer may return the goods, or must be confined to an action for the breach, the cases are not agreed. That he may not rescind, see *Freyman v.*

397. **Non-vital terms (or warranties).** The nature of a warranty as compared with a condition is illustrated by the case of *Bettini v. Gye*.^a Bettini entered into a contract with Gye, director of the Italian Opera in London, for the exclusive use of his services as a singer in operas and concerts for a considerable time and on a number of terms. Among these terms was an undertaking that he would be in London six days at least before the commencement of his engagement, for rehearsals. He only arrived two days before his engagement commenced, and Gye thereupon threw up the contract.

Blackburn, J., in delivering the judgment of the court described the process by which the true meaning of such terms in contracts is ascertained.

First, he asks, does the contract give any indication of the intention of the parties?

"Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be done: or they may think that the performance of some matter apparently of essential importance and *prima facie* a condition precedent is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent."^b

He finds in the contract no such expression of the intention of the parties; this being so, the interpretation of the disputed term remained for the court. It was held that the term as to rehearsals was not vital to the contract, and was not a condition: its breach did not operate as a discharge and could be compensated by damages.¹

398. **Warranty: different senses in which term used.** A warranty may be called a more or less unqualified promise of indemnity against a failure in the performance of a particular term in the contract. The phrase can be illustrated by the contract between a railway company and its passengers. It is sometimes said that a railway company as a common carrier warrants the safety of a passenger's luggage, but does not warrant

^a (1876) 1 Q.B.D. 183.

^b *Bettini v. Gye*, (1876) 1 Q.B.D. 187.

Knecht, (1875) 78 Pa. 141, and see 4 *Columbia Law Review*, 1, 265. That he may rescind see *Bryant v. Isburgh*, (1859, Mass.) 13 Gray, 607, and see 16 *Harvard Law Review*, 465 and 4 *Columbia Law Review*, 195.

¹ *Weintz v. Hafner*, (1875) 78 Ill. 27; *Pickens v. Bozell*, (1858) 11 Ind. 275; *Boyle v. Guysinger*, (1859) 12 Ind. 273. See *Mill-Dam Foundry v. Hovey*, (1839, Mass.) 21 Pick. 417, 444. But American courts would be very unlikely to call these non-vital terms warranties.

his punctual arrival at his destination in accordance with its time tables. In the true use of the term *warranty*, as distinct from a term creating a *condition*, the company warrants the one just as much as it warrants the other. In each case it makes a promise subsidiary to the entire contract, but in the case of the luggage its promise is qualified only by the excepted risks incident to the contract of a common carrier;^a in the case of the time table its promise amounts to no more than an undertaking to use reasonable diligence to insure punctuality.^b The answer to the question whether a promise is or is not a warranty does not depend on the greater or less degree of diligence which is exacted or undertaken in the performance of it, but on the mode in which the breach of it affects the liabilities of the other party.

It is right to observe that the word *warranty* is used in a great variety of senses,^c and that in insurance law the term is not unfrequently convertible with *condition*. It was so used in the Marine Insurance Act, 1906.^d But I would submit that its primary meaning is that which I have assigned to it. "A warranty is an express or implied statement of something which the party undertakes shall be a term in the contract and, though part of the contract, collateral to the chief object of it."^e

399. Waiver of condition by receiving performance. One cause of the confusion which overhangs the use of the term *warranty* arises from the rule that a condition may change its character in the course of the performance of a contract; a representation or promise the breach of which would have effected a discharge if treated so at once by the promisee, ceases to create a condition if he goes on with the contract and takes a benefit under it. It is then called a *warranty*.^f

This aspect of a condition is well illustrated by the case of *Pust v. Dowie*.^g A vessel was chartered for a voyage to Sydney;

^a *Richards v. L.B. & S.C. Railway Co.*, (1849) 7 C.B. 839.

^b *Le Blanche v. L. & N.W. Railway Co.*, (1876) 1 C.P.D. 288.

^c See note on meaning of the word "Warranty" at the end of this section.

^d Edw. VII, c. 41, §§ 33-41.

^e Lord Abinger, C.B., in *Chanter v. Hopkins*, (1838) 4 M. & W. 404.

^f *Graves v. Legg*, (1854) 9 Ex. 717. See 56 & 57 Vict. c. 71, §§ 11, 53, and *Chalmers, Sale of Goods Act* (7th ed.), pp. 36-38, 127-129.

^g (1864) 32 L.J. Q.B. 179.

¹ In case of the breach of an implied condition in the sale of goods the buyer may, instead of rejecting the goods, accept them and sue as for a breach of warranty. The implied condition is said to become a warranty *ex post facto*. "Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial." *Wolcott v. Mount*, (1873) 36 N.J. L. 262; *Morse v. Moore*, (1891) 83 Me. 473. *Contra*: *Coplay Iron Co. v. Pope*, (1888) 108 N.Y. 232; but see *Bierman v. City Mills Co.*, (1897) 151 N.Y. 482.

the charterer promised to pay £1550 in full for this use of the vessel on condition of her taking a cargo of not less than 1000 tons weight and measurement. He had the use of the vessel as agreed upon; but she was not capable of holding so large a cargo as had been made a condition of the contract. He refused to pay the sum agreed upon, pleading the breach of this condition. The term in the contract as to weight and bulk of cargo was held, in its inception, to have created a condition. Blackburn, J., said:

"If when the matter was still *executory*, the charterer had refused to put any goods on board, on the ground that the vessel was not of the capacity for which he had stipulated, *I will not say that he might not have been justified in repudiating the contract altogether*; and in that case the condition would have been a condition precedent in the full sense." But he adds: — "Is not this a case in which a substantial part of the consideration has been received? And to say that the failure of a single ton (which would be enough to support the plea) is to prevent the defendant from being compelled to pay anything at all, would be deciding contrary to the exception put in the case of *Behn v. Burness*."

NOTE ON THE VARIOUS MEANINGS OF "WARRANTY"

For the purposes of the contract for the sale of goods the sense in which I have used the word *warranty* in this chapter is adopted in the Sale of Goods Act, 1893, § 62, but it may be worth setting out some of the uses of the term to be found in the Reports:

(1) It is used as equivalent to a condition precedent in the sense of a descriptive *statement* vital to the contract: *Behn v. Burness*, (1863) 3 B. & S. 751; *Ollive v. Booker*, (1847) 1 Exch. 416.

(2) It is used as equivalent to a condition precedent in the sense of a *promise* vital to the contract: *Behn v. Burness*.

(3) It is used as meaning a condition the breach of which has been acquiesced in, and which therefore forms a cause of action but does not create a discharge: *Behn v. Burness*.

(4) In relation to the sale of goods it is used as an independent subsidiary promise, "collateral to the main object of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods": *Chanter v. Hopkins*, (1838) 4 M. & W. 404.

(5) In relation to the sale of goods, warranty is used for an express promise that an article shall answer a particular standard of quality; and this promise is a condition until the sale is executed, a warranty after it is executed: *Street v. Blay*, (1831) 2 B. & A. 456.

(6) *Implied warranty* is a term used very often in such a sense as to amount to a repetition by implication of the express undertaking of one of the contracting parties: *Jones v. Just*, (1868) L.R. 3 Q.B. 197. Thus there was said to be an implied warranty in an executory contract of sale that goods shall answer to their specific description and be of a

merchantable quality. This is now an implied condition. Sale of Goods Act, §§ 13, 14.

Implied warranty of seaworthiness is a condition of the same character. It is an undertaking, which is implied in every voyage policy of marine insurance, that the vessel insured shall be reasonably fit "as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it": *Dixon v. Sadler*, (1841) 5 M. & W. 414.

Implied warranty of title has been a vexed question, and there are conflicting cases. *Eicholz v. Bannister*, (1864) 17 C.B., N.S. 708; *Baguely v. Hawley*, (1867) L.R. 2 C.P. 625. In the contract of sale of goods, the undertaking for title is now an "implied condition": 56 & 57 Vict. c. 71, § 12.

Implied warranty of authority is the undertaking which a professed agent is supposed to give to the party with whom he contracts, that he has the authority which he professes to have. Implied warranty of possibility is a supposed undertaking that a promise is not impossible of performance: *Collen v. Wright*, (1857) 7 E. & B. 301; 8 E. & B. 647; *Clifford v. Watts*, (1870) L.R. 5 C.P. 577.

And it is to be noticed that even in marine insurance policies, in which as a general rule this word "warranty" is used in the sense commonly assigned to "condition," examples to the contrary are often found. Thus "warranted free of particular average" only means that it is agreed that no claim is to be made under the policy for a partial (as opposed to total) loss. (See Appendix, Forms B and C.)

(d) Rules of law and equity as to time

400. **Stipulations as to time.** Where a time was fixed for the performance of his undertaking by one of the parties to a contract, the common law held this to be "of the essence of the contract." If the condition as to time were not fulfilled, the other party might treat the contract as broken and discharged.

Equity did not so regard conditions as to time, but inquired whether the parties when they fixed a date meant anything more than to secure performance within a reasonable time. If this was found to be their intention the contract was not held to be broken if the party who was bound as to time did perform, or was ready to perform, his contract within a reasonable time.¹

¹ *Thurston v. Arnold*, (1876) 43 Iowa, 43; *Beck & Co. v. Colorado & Co.*, (1892) 10 U.S. App. 465; s.c. 52 Fed. 700; *Coleman v. Applegarth*, (1887) 68 Md. 21; *Hubbell v. Von Schoening*, (1872) 49 N.Y. 326; *Austin v. Wacks*, (1883) 30 Minn. 335. It is a "breach" of contract, at both law and equity, not to perform within the time specified in the contract, and an action for damages will lie for such a breach. But performance within the specified time by one party may not be expressly described in the contract as a condition precedent to the duty of performance by the other party, and in such case the question whether performance on time is a *constructive* condition must be determined by equitable considerations. When such

The Judicature Act provides that stipulations as to time "shall receive in all courts the same construction and effect as they would have heretofore received in equity."^a

The effect of this enactment seems to be confined to such contracts as were dealt with in the chancery courts before the Judicature Acts; and to apply the rule to mercantile contracts has been held to be unreasonable.^b In contracts of this nature the general rule is (in the absence of agreement to the contrary) that stipulations as to time, *except as to time of payment*, create essential conditions.^c¹

II. REMEDIES FOR BREACH OF CONTRACT

401. **Secondary rights existing after breach.**² We have already seen that a breach of contract is a new operative fact with important legal consequences. While not operating as a discharge of the party guilty of the breach, it may nevertheless have the very vital effect of preventing the existence of any duty of further performance by the other party. This has been discussed in the preceding pages. In addition to this, a breach always operates to create new rights in the injured party and new correlative duties on the wrongdoer. The sum-total of rights and duties existing after a breach may conveniently be referred to as a *secondary obligation*. We have discussed in the preceding pages how a breach may create in the injured party a new privilege of not performing. We must now consider the new rights and remedies of the injured party and the existing duties of the contract breaker.

Where a party to a contract has committed a breach of his contractual duty there are three sorts of rights that may then exist in the injured party: (1) the right to compensation for such part performance as he has himself done; this is measured by

^a 36 & 37 Vict. c. 66, § 25, sub-a. 7.

^b *Reuter v. Sala*, (1879) 4 C.P.D. (C.A.) 249.

^c 56 & 57 Vict. c. 71, § 10.

performance on time is held to be a condition, express or constructive, time is said to be "of the essence." The rule of equity now prevails in all courts, and it may be doubted whether there was ever a very substantial difference in this respect between law and equity. According to the common law of earlier days bilateral promises were held to be totally independent, and so time could not be "of the essence" in the absence of express words to that effect.

¹ *Norrington v. Wright*, (1885) 115 U.S. 188; *Davison v. Von Lingen*, (1884) 113 U.S. 40.

² This section has been written by the American editor, and the succeeding section has been considerably altered by him.

the value received by the defendant and is *quasi-contractual* in character; (2) the right to *damages*, measured by the value of the promised performance of the defendant; this is a secondary right created by the law to compensate in full for breach of the primary one; (3) the right to *specific reparation*, enforceable in equity; this is very much like his pre-existing primary contractual right.¹

1. *Quasi-contractual rights*

402. **Secondary right of restitution.** The injured party may have already done a part, though not all, of that which he was bound to do under the contract. In such a case, if the breach is such as to discharge the injured party from any further duty, he may sue for damages arising from the breach, or in the alternative he may sue for the reasonable value of his existing part performance by which the defendant is profiting.² If he adopts the latter alternative his form of action at common law was *assumpsit*; and he generally, although not necessarily, used the common *indebitatus* counts or the counts for *quantum meruit* or *quantum valebat*.

"If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received."³

This duty of the defendant to pay for value received is a new and distinct duty, secondary and remedial in character. In this respect, it is like the secondary duty to pay *damages* upon

³ Best, C.J., in *Mavor v. Pyne*, (1825) 3 Bing. 288.

¹ Observe that in quasi-contract the remedy is *debt* and the measure of recovery is the *amount received* by the defendant; in a suit for damages for breach of contract the form of action at common law was *assumpsit* (unless already liquidated) and the measure of recovery is the *extent of the plaintiff's disappointment*, the reasonably *expected addition* to his estate, *not* the value of the consideration given by him; in a suit for damages for a *tort* the measure of recovery is the amount by which the plaintiff's estate has been decreased by *subtraction*. This shows the extent to which *assumpsit* departed from its parent action of *trespass*.

² *Dutch v. Warren*, (1721) 1 Strange, 406; *Clark v. Manchester*, (1872) 51 N.H. 594; *Wellston Coal Co. v. Franklin Paper Co.*, (1897) 57 Ohio St. 182; *Brown v. Woodbury*, (1903) 183 Mass. 279; *Derby v. Johnson*, (1848) 21 Vt. 17; *Connolly v. Sullivan*, (1899) 173 Mass. 1; *Southern Pacific Co. v. American Well Works*, (1898) 172 Ill. 9; *Mooney v. York Iron Co.*, (1890) 82 Mich. 263. Some cases have held that the maximum limit of the plaintiff's recovery is the contract price. *Chicago v. Sexton*, (1885) 115 Ill. 230; *Harlow v. Beaver Falls*, (1898) 188 Pa. 263.

breach of a contract. There is no sufficient reason for describing either of them as a new *contract*. The chief difference between them is that in an action for *damages* the plaintiff's recovery is measured by the amount of his loss, while in an action for *quantum meruit* or *quantum valebat* it is measured by the value received by the defendant. The latter action is *debt* rather than *assumpsit*, and the obligation is frequently classified as a *quasi-contract* or non-contract debt. In these cases, the injured party is given these two remedial rights to be enforced only in the alternative.

The right of the injured party to sue in this way on a *quantum meruit* for work done under the original contract is frequently and emphatically stated to depend on the fact that the contract has been discharged.

"It is said to be an invariably true proposition, that wherever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit*, for anything which he had done under it previously to the rescission."¹

It is possible that *A* may have done nothing under the contract which can be estimated at a money value; then if the breach is such as to amount to a discharge, *A's* sole remedy is to sue upon the original contract for the damage that he has sustained; though he is of course exonerated from such performance as may still be due from him on his own part.

We must in dealing with this topic of the *quantum meruit* bear in mind that the sum sued for under that designation may be due either for work done in part-performance of the contract; or for work done under the contract, but not in accordance with its terms; or for work done or goods supplied irrespective of any special contract.^b

In the first case the remedy arises out of the breach and when the plaintiff's duty has been discharged by the defendant's breach.^c In the second case, the remedy is on a contract sub-

^a *Hulle v. Heightman*, (1802) 2 East, 145; 2 Sm. L. C. 19.

^b *Dakin v. Lee*, [1916] 1 K.B. 566.

^c *Burn v. Miller*, (1813) 4 Taunt. 745.

¹ The statement that the injured party may "elect to rescind" is not uncommon, but it seems better to reserve the word *rescission* to describe a discharge by mutual agreement. The injured party at once gains a secondary *right* to damages, or in the alternative a secondary *right* to reasonable value. Further he gains the *privilege* of not performing his part. His exercise of this privilege and his election of the second of the two rights is what is meant when the word "rescind" is used in this connection.

stituted for that which the parties originally made and is distinct from the remedy in damages for the broken contract.^{a 1} In the third case, we have a contract formed by acceptance of goods or services for which a reasonable man would expect to be required to pay; and here we part company with any connection between *quantum meruit* and breach.

But the defendant cannot be called on to pay for work which is not in accordance with the terms of the contract and which he has had no opportunity given him of deciding to accept or reject. Where a ship-repairer agreed for a lump sum to repair a ship, but did the work agreed upon in a manner which departed materially from the terms of his contract and did a good deal more than was agreed upon without any authority from the ship-owner, it was held that he could recover nothing.^b He could not recover under the original contract, because he had not performed it; nor under a substituted contract because the ship-owner had not agreed to any substituted performance; nor could any agreement be inferred from the fact that the defendant had received his ship back and kept her. The ship was his own property and he had no option but to take her back in the condition in which the plaintiff had left her, and to make the best of circumstances which had arisen through no fault of his own.

2. Secondary right to damages

Apart from those just discussed, the remedies of the injured party are of two kinds: he may seek to obtain *damages* for the

^a *Munro v. Butt*, (1858) 8 E. & B. 738.

^b *Forman v. Liddesdale*, [1900] A.C. 190.

¹ In this case the plaintiff himself is in default, or at any rate has not fulfilled some condition precedent to his contract right against the defendant. There is much conflict as to whether in such a case the plaintiff has a quasi-contractual right to compensation. If he has such a right, the measure of recovery is the net enrichment of the defendant after deducting such damages as he may be entitled to because of plaintiff's breach. Some courts hold that the plaintiff can recover nothing if his breach was *wilful*. This amounts to the exaction of a penalty wholly unrelated in amount to the damage done. In the following cases the plaintiff recovered: *Oxendale v. Wetherell*, (1829) 7 L.J.K.B. 264 (sale of goods); *Pinches v. Swedish Church*, (1887) 55 Conn. 183 (building contract); *Britton v. Turner*, (1834) 6 N.H. 481 (service contract); *Lynn v. Seby*, (1915) 29 N.D. 420 (same). *Contra*: *Champlin v. Rowley*, (1835, N.Y.) 13 Wend. 258 (sale of goods); *Feeney v. Bardale*, (1901) 66 N.J. L. 239 (building contract; no recovery unless defendant has "accepted" the result); *McGonigle v. Klein*, (1895) 6 Colo. App. 306 (same); *Johnson v. Fehsefeldt*, (1908) 106 Minn. 202 (service contract; this represents the weight of authority in service cases); *Stark v. Parker*, (1824, Mass.) 2 Pick. 267 (service); *Catlin v. Tobias*, (1863) 26 N.Y. 217.

loss he has sustained; or he may seek to obtain a *decree for specific performance*, or an *injunction*, to enforce the promised acts or forbearances of the other party.

But there is this difference between the two remedies: every breach of contract entitles the injured party to *damages*, though they be but nominal; but it is only in the case of certain contracts and under certain circumstances that *specific performance* or an *injunction* can be obtained. I will endeavor to state briefly some elementary rules which govern the two remedies in question.

403. Damages should represent loss arising from breach. When a contract is broken and action is brought upon it, — the damages being unliquidated, that is to say unascertained in the terms of the contract, — how are we to arrive at the amount which the plaintiff, if successful, is entitled to recover?

“The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”^a

Where no loss accrues from the breach of contract, the plaintiff is nevertheless entitled to a verdict, but for nominal damages only, and “nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity.”^{b 1} And so in an action for the non-payment of a debt, where there is no promise to pay interest upon the debt, nothing more than the sum due can be recovered; for the possible loss arising to the creditor from being kept out of his money is not allowed to enter into the consideration of the jury in assessing damages, unless it was expressly stated at the time of the loan to be within the contemplation of the parties, or unless an agreement to pay interest can be inferred from the course of dealing between the parties.^c By 3 & 4 Will. IV, c. 42, §§ 28, 29, a jury may allow interest at the current rate by way of damages in all cases where a debt or sum certain was payable by virtue of a written instrument or on a policy of insurance, or if not so payable was demanded in writing with notice that interest would be claimed from the date of the demand.² And by § 57 of the Bills

^a Parke, B., in *Robinson v. Harman*, (1848) 1 Ex. 155.

^b Maule, J., in *Beaumont v. Greathead*, (1846) 2 C.B. 499.

^c *In re Marquis of Anglesey*, [1901] 2 Ch. (C.A.) 548.

¹ *Barnes v. Brown*, (1892) 130 N.Y. 372; *Streator v. Paxton*, (1902) 201 Pa. 135.

² Interest by way of damages for the wrongful detention of money is generally allowed in this country. *Curtis v. Innerarity*, (1848, U.S.) 6 How. 146, 154; *Spalding v. Mason*, (1895) 161 U.S. 375, 395. See 13 Cyc. 83–86.

of Exchange Act, 1882, interest may be claimed in an action on a dishonored bill. By a long-established practice also the Admiralty Court, differing in this respect from the Courts of Common Law, awards interest on damages recovered in Admiralty suits.^a

404. So far as it was in contemplation of the parties. The rule laid down by Parke, B., in *Robinson v. Harman* must be taken subject to considerable limitations in practice.

The breach of a contract may result in losses which neither party contemplated, or could contemplate at the time that the contract was entered into. In such a case the damages to which the plaintiff is entitled are no more than might have been supposed by the parties to be the natural result of a breach of the contract.^b In determining the measure of damages — as in determining the meaning of a contract — where the parties have left the matter doubtful we ask what would have been in the contemplation of a reasonable man when the contract was made.^c

A special loss which would not naturally and obviously flow from the breach, must, if it is to be recovered, be matter of express terms in the making of the contract.^d

In *Horne v. Midland Railway Company*,^d the plaintiff being under contract to deliver shoes in London at an unusually high price by a particular day, delivered them to the defendants to be carried, with notice of the contract only as to the date of delivery. The shoes were delayed in carriage, and were consequently rejected by the intending purchasers. The plaintiff sought to recover, in addition to the ordinary loss for delay, the difference between the price at which the shoes were actually sold and the high price at which they would have been sold if they had been punctually carried. It was held that this damage was not recoverable, unless it could be proved that the company were informed of, and undertook to be liable for, the exceptional loss which the plaintiff might suffer from an unpunctual delivery.^e

^a *The Gertrude*, (1887) 12 P.D. 204.

^b *Hadley v. Baxendale*, (1854) 9 Ex. 354.

^c *Agius v. G. W. Colliery Co.*, [1899] 1 Q.B. 413.

^d (1873) L.R. 8 C.P. 131.

^e See *Bostock v. Nicholson*, [1904] 1 K.B. 725.

¹ *Creamery Package Mfg. Co. v. Creamery Co.*, (1903) 120 Iowa, 584.

² *Wolcott v. Mount*, (1873) 38 N.J. L. 262; *Rochester Lantern Co. v. Stiles & Co.*, (1892) 135 N.Y. 209; *Allison v. Chandler*, (1863) 11 Mich. 542; *Fox v. Boston & C. R.*, (1889) 148 Mass. 220; *Loneragan v. Waldo*, (1901) 179 Mass. 135.

³ *Booth v. Spuyten Duyvil Rolling Mill Co.*, (1875) 60 N.Y. 487; *Globe Refining Co. v. Oil Co.*, (1902) 190 U.S. 540.

⁴ *Lynch v. Wright*, (1899) 94 Fed. 703.

405. Difficulty of assessing does not bar recovery. Difficulty in assessing damages does not disentitle a plaintiff from having an attempt made to assess them, unless they are altogether speculative and depend upon remote and hypothetical possibilities.^{a 1}

A manufacturer was in the habit of sending specimens of his goods for exhibition to agricultural shows, and he made a profit by the practice. He intrusted some such goods to a railway company, who promised the plaintiff, under circumstances which should have brought his object to their notice, to deliver the goods at a certain town on a fixed day. The goods were not delivered at the time fixed, and consequently were late for a show at which they would have been exhibited. It was held that though the ascertainment of damages was difficult and speculative, the difficulty was no reason for not giving any damages at all.^b

And further, the plaintiff is entitled to recover for prospective loss arising from a refusal by the defendant to perform a contract by which the plaintiff would have profited. Thus where a contract was made for the supply of coal by the defendants to the plaintiff by monthly installments, and breach occurred and action was brought before the last installment fell due, it was held that the damages must be calculated to be the difference between the contract price and the market price at the date when each installment should have been delivered, and that the loss arising from the non-delivery of the last installment must be calculated upon that basis, although the time for its delivery had not arrived.^{c 2} And the rule that the difference between the contract price and the market price is the measure of damages in such a case applies even where the purchaser, having arranged to resell at less than the market price, would not in fact have realized that difference if the vendor had carried out his contract;

^a *Robinson v. Harman*, (1848) 1 Ex. 855; *Sapwell v. Bass*, [1910] 2 K.B. 486.

^b *Simpson v. L. & N.W. Railway Co.*, (1876) 1 Q.B.D. 274; *Chaplin v. Hicks*, [1911] 2 K.B. 786.

^c *Roper v. Johnson*, (1873) L.R. 8 C.P. 167.

¹ *Wakeman v. Wheeler & Wilson Mfg. Co.*, (1886) 101 N.Y. 205; *Beeman v. Banta*, (1890) 118 N.Y. 538; *Swain v. Schieffelin*, (1892) 134 N.Y. 471; *United States v. Behan*, (1884) 110 U.S. 338; *Howard v. Manufacturing Co.*, (1891) 139 U.S. 199. As to the effect of the injured party's failure to use reasonable care not to increase his own damages, see *Mather v. Butler County*, (1869) 28 Iowa, 253; *Parsons v. Sutton*, (1876) 66 N.Y. 92; *Clark v. Marsiglia*, (1845, N.Y.) 1 Denio, 317.

² See *Pakas v. Hollingshead*, (1906) 184 N.Y. 211.

for after the breach the purchaser would have been compelled to buy at the market price in order to put himself into the same position as if the contract had been fulfilled.^a

406. **May not be punitive.** Damages for breach of contract are by way of compensation and not of punishment. Hence a plaintiff can never recover more than such pecuniary loss as he has sustained, subject to the above rules. Thus, in an action by a servant for wrongful dismissal, "the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."^b

To this rule the breach of promise of marriage is an exception; in such cases the feelings of the person injured are taken into account, in addition to such pecuniary loss as can be shown to have arisen.^{c 1}

407. **Penalties and liquidated damages.** Where the terms of a contract specify a sum payable for non-performance, it is a question of construction whether this sum is to be treated as a *penalty*, or as *liquidated damages*. The difference in effect is this: The amount recoverable in case of a penalty is not the sum named, but the damage actually incurred. The amount recoverable as liquidated damages is the sum named as such. In construing these terms a judge will not accept the phraseology of the parties; they may call the sum specified "liquidated damages," but if the judge finds it to be a penalty, he will treat it as such.²

A bond is in form a promise to pay a penal sum, generally on the non-performance of a covenant or agreement contained or recited in the bond. It may, however, take the form of a promise to pay a sum in compensation for damages arising from an act or acts specified in the bond.^d In the case of bonds or contracts

^a *Williams v. Agnis*, [1914] A.C. 510.

^b *Addie v. Gramophone Co.*, [1909] A.C. 488, at p. 491.

^c *Finlay v. Chirney*, (1888) 20 Q.B.D. at p. 498.

^d *Strickland v. Williams*, [1899] 1 Q.B. 382.

¹ *Thorn v. Knapp*, (1870) 42 N.Y. 474; *Jacoby v. Stark*, (1903) 205 Ill. 34. So also for failure to furnish a wedding trousseau. *Lewis v. Holmes*, (1903) 109 La. 1030; but see *Coppola v. Kraushaar*, (1905) 102 N.Y. App. Div. 306. So also for breach of contract involving burial or care of bodies of deceased relatives. *Hale v. Bonner*, (1891) 82 Tex. 33; *Renihan v. Wright*, (1890) 125 Ind. 536. As to recovery for mental anguish due to non-delivery of telegrams, see 13 L.R.A. 859, note, and 59 L.R.A. 398, note.

² Or conversely, *Streep v. Williams*, (1865) 48 Pa. 450.

containing provisions of this nature it has been laid down that "the court must look to all the circumstances of each contract — to what the parties did as well as to the language used — and must say from them what the intention of the parties was,"^a but the following rules may be stated.

(1) If a contract is for a matter of uncertain value, and a fixed sum is to be paid for the breach of one or more of its provisions, this sum may be recovered as liquidated damages.^b But the sum fixed must not be unreasonable or extravagant, having regard to all the circumstances of the case. If it is, it will be a penalty.

(2) If a contract is for a matter of certain value, and on breach of it a sum is to be paid in excess of that value, this is a penalty and not liquidated damages.^{c 1}

(3) If a contract contains a number of terms, some of certain and some of uncertain value, and a fixed sum is to be paid for the breach of any of them, there is a presumption that this is a penalty.^{d 2}

An illustration of (1) is afforded by clauses in building contracts to pay a fixed sum weekly or *per diem* for delay; or, in the case of a tenant of a public-house, to pay to the landlord a fixed sum as penalty on conviction for a breach of the licensing laws.^{e 3}

An illustration of (2) is a promise to pay a larger sum if a smaller were not paid by a fixed day. The rule is harsh, for a man might suffer serious loss by the non-receipt of an expected payment: yet he can only recover the smaller sum.⁴

On the other hand, it is no penalty to provide that if a debt is to be paid by installments the entire balance of unpaid installments is to fall due on default of any one payment,⁵ or that a de-

^a *Fye v. British Automobile Syndicate*, [1906] 1 K.B. 425. *Webster v. Bosanquet*, [1913] A.C. 394.

^b *Dunlop v. New Garage Co.*, [1915] A.C. 79.

^c *Astley v. Weldon*, (1801) 2 B. & P. 346.

^d *Kemble v. Farren*, (1829) 6 Bing. 147; *Dunlop v. New Garage Co.*, [1915] A.C. 79, 87.

^e *Ward v. Monaghan*, (1895) 11 T.L.R. (C.A.) 529.

¹ *Baird v. Tolliver*, (1845, Tenn.) 6 Humph. 186.

² *Chicago B. & Q.R. Co. v. Dockery*, (1912, C.C.A.) 195 Fed. 221.

³ *Curtis v. Van Bergh*, (1899) 161 N.Y. 47 (\$50 a day); *Hennessy v. Metzger*, (1894) 152 Ill. 505 (\$50 a day); *Guerin v. Stacy*, (1900) 175 Mass. 595 (breach of covenant in lease); *Garst v. Harris*, (1900) 177 Mass. 72 (breach of agreement not to cut prices on proprietary article).

⁴ See *Waggoner v. Cox*, (1884) 40 Ohio St. 539.

⁵ *Bennett v. Stevenson*, (1873) 53 N.Y. 508 [see *Noyes v. Anderson*, (1891) 124 N.Y. 175]; *Olcott v. Bynum*, (1872, U.S.) 17 Wall. 44, 62; *Cassidy v. Caton*, (1877) 47 Iowa, 22.

posit of purchase money should be forfeited on breach of any one of several stipulations, some important, some trifling.^{a 1}

An illustration of (3) is offered by *Kemble v. Farren*.^b Farren agreed to act at Covent Garden Theatre for four consecutive seasons and to conform to all the regulations of the theatre; Kemble promised to pay him £3 6s. 8d. for every night during those seasons that the theatre should be open for performance, and to give him one benefit night in each season. For a breach of any term of this agreement by either party, the one in default promised to pay the other £1000, and this sum was declared by the said parties to be "liquidated and ascertained damages and not a penalty or penal sum or in the nature thereof." Farren broke the contract, the jury put the damages at £750, and the court refused to allow the entire sum of £1000 to be recovered.^{c 2}

"If, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty appears to be a contradiction in terms."

But these rules are no more than *presumptions* as to the intention of the parties; which may be rebutted by evidence of a contrary intention, appearing from a consideration of the contract as a whole.^{c 3}

^a *Protector Loan Co. v. Grice*, (1880) 5 Q.B.D. (C.A.) 592. *Wallis v. Smith*, (1882) 21 Ch. D. at p. 257.

^b (1829) 6 Bing. 141.

^c *Pye v. British Automobile Syndicate*, [1906] 1 K.B. 425.

¹ *Sanders v. Carter*, (1893) 91 Ga. 450; *Sanford v. First N. Bk.*, (1895) 94 Iowa, 680; *Fessman v. Seeley*, (1895, Tex.) 30 S.W. 268 (tuition forfeited on expulsion). But a deposit by way of security out of which damages are to be paid will be regarded as liquidated damages. *Willson v. Baltimore*, (1896) 83 Md. 203 (reviewing authorities); *Chaudé v. Shepard*, (1890) 122 N.Y. 397; *Michaels v. Fishel*, (1902) 169 N.Y. 381, 391.

² *Signall v. Gould*, (1886) 119 U.S. 495; *Fisk v. Gray*, (1865, Mass.) 11 Allen, 132; *Lansing v. Dodd*, (1883) 45 N.J. L. 525. But if the damages from the breach of any one term would be uncertain the stipulated sum will be treated as liquidated damages. *Cotheal v. Talmage*, (1854) 9 N.Y. 551; *Clement v. Cash*, (1860) 21 N.Y. 253.

³ The intention of the parties is the criterion, and when they say a sum is to be payable as liquidated damages they will generally be taken to mean what they say. *Guerin v. Stacy*, (1900) 175 Mass. 595. Some disproportion between the sum fixed and the loss is not enough to induce the court to ignore the agreement by which the parties made their own estimate of damages. *Sun Printing & Pub. Ass'n v. Moore*, (1902) 183 U.S. 642, 660-674 (reviewing the doctrines); *Cotheal v. Talmage*, (1854) 9 N.Y. 551. Never-

3. *The right to specific reparation*

408. **Rules governing specific performance.** Under certain circumstances a promise to do a thing may be enforced by a decree for specific performance,¹ and an express or implied promise to forbear by an injunction.²

These remedies were once exclusively administered by the chancery. They supplemented the remedy in damages offered by the common law, and were granted at the discretion of the chancellor acting as the administrator of the king's grace.

It will be enough here to illustrate the two main characteristics of these remedies — that they are supplementary — that they are discretionary.

(1) Where damages are an adequate remedy, specific performance will not be granted.

"The remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary and confined within well-known rules." ^a

Damages may be a very insufficient remedy for the breach of a contract to convey a plot of land: the choice of the intending purchaser may have been determined by considerations of profit, health, convenience, or neighborhood: but damages can usually be adjusted so as to compensate for a failure to supply goods. In the case of an agreement to sell goods the chancery would decree the specific performance only in the case of chattels possessing a special beauty, rarity, or interest.³

^a *Ryan v. Mutual Tontine Association*, [1893] 1 Ch. at p. 126.

theless it is believed that if the sum described as liquidated damages can be shown to be very much more than the damage actually suffered the courts will refuse to give judgment for that amount. In such case the court will be unwilling to believe that the parties intended in good faith to make an accurate advance estimate of the probable damage; but even if they did so intend in good faith, and erred in their estimate because of ignorance, the decision would probably be the same. If this be true, the intention of the parties is not the chief operative fact. In all contract cases it is the purpose of the law not to *punish* but to give exact *compensation*. For this reason, express stipulations that operate as punishment are not enforced.

¹ *Adams v. Messinger*, (1888) 147 Mass. 185; *Miles v. Schmidt*, (1897) 168 Mass. 339.

² *Diamond Match Co. v. Roeber*, (1887) 106 N.Y. 473; *Cort v. Lassard*, (1889) 18 Ore. 221; *Stovall v. McCutchen*, (1900) 107 Ky. 577.

³ *Adams v. Messinger*, (1888) 147 Mass. 185; *Johnson v. Brooks*, (1883) 93 N.Y. 337; *Rothholz v. Schwartz*, (1890) 46 N.J. Eq. 477; *Gottschalk v. Stein*, (1888) 69 Md. 51; *Singer v. Carpenter*, (1888) 125 Ill. 117. See also *Miles v. Schmidt*, (1897) 168 Mass. 339.

It is only by statute, and in the case of a breach of contract to deliver *specific* goods, that the court may direct the contract to be performed specifically without allowing the seller an option to retain the goods and pay damages.^a

(2) Where the court cannot supervise the execution of the contract specific performance will not be granted.¹

If the court endeavored to enforce a contract of employment, or a contract for the supply of goods to be delivered by installments, it is plain "that a series of orders and a general superintendence would be required which could not conveniently be undertaken by any court of justice," and "the court acts only where it can perform the very thing in the terms specifically agreed upon."^b

(3) Unless the contract is "certain, fair, and just," specific performance will not be granted.²

It is here that the discretionary character of the remedy is most strongly marked. It does not follow that specific performance, will be granted, although there may be a contract actionable at common law, and although damages may be no adequate compensation. The court will consider the general fairness of the transaction, and refuse the remedy if there is any suspicion of sharp practice on the part of the suitor.^c

Akin to this principle is the requirement that there must be *mutuality* between the parties. This means that at the time of making the contract there must have been consideration on both sides or promises mutually enforceable by the parties.^d Hence specific performance of a gratuitous promise under seal will not be granted;^e nor can an infant enforce a contract by this remedy.^f

^a 56 & 57 Vict. c. 71, § 52.

^b *Wolverhampton Railway Co. v. L. & L.W. Railway Co.*, (1873) L.R. 16 Eq. 439.

^c *Webster v. Cecil*, (1861) 30 Beav. 62.

^d *Kekewich v. Manning*, (1851) 1 D. M. & G. at p. 188.

^e *In re Lucan*, (1890) 45 Ch. D. 470. / *Flight v. Bolland*, (1828) 4 Russ. 298.

¹ *Beck v. Allison*, (1874) 56 N.Y. 366; *Standard Fashion Co. v. Siegel-Cooper Co.*, (1898) 157 N.Y. 60; *Ross v. Union Pac. Ry.*, (1863, U.S.) 1 Woolw. 26. But see *Lawrence v. Ry.*, (1885, N.Y.) 36 Hun. 467; *Joy v. St. Louis*, (1890) 138 U.S. 1.

² *Thurston v. Arnold*, (1876) 43 Iowa. 43; *Conger v. Ry.*, (1890) 120 N.Y. 29; *Friend v. Lamb*, (1893) 152 Pa. 529.

³ *Crandall v. Willig*, (1897) 166 Ill. 233. But if a donee of lands goes into possession and makes valuable improvements in reliance upon the promise, equity will specifically enforce it. *Freeman v. Freeman*, (1876) 43 N.Y. 34; *Irwin v. Dyke*, (1885) 114 Ill. 302; *Manly v. Howlett*, (1880) 55 Cal. 94; *Smith v. Smith*, (1891) 125 N.Y. 224.

⁴ *Richards v. Green*, (1872) 23 N.J. Eq. 536. But see *Seaton v. Tohill*, (1898) 11 Colo. App. 211.

His promise is not enforceable against himself and though he might bring action upon it in the King's Bench Division of the High Court, "it is a general principle of courts of equity to interfere only where the remedy is mutual."¹

409. Injunction for enforcement of negative covenants. An injunction may be used as a means of enforcing a simple covenant or promise to forbear. Such would be the case of building covenants restraining the use of property otherwise than in a certain specified manner.^a

Or it may be the only means of enforcing the specific performance of a covenant where damages would be an inadequate remedy, while to enforce performance of the covenant would involve a general superintendence such as the court could not undertake. Thus a hotel-keeper who obtained a lease of premises with a covenant that he would buy beer exclusively of the lessor and his assigns was compelled to carry out his covenant by an injunction restraining him from buying beer elsewhere.^b

Lumley v. Wagner^c is an extreme illustration of the principle. Miss Wagner agreed to sing at Lumley's theatre, and during a certain period to sing nowhere else. Afterwards she made a contract with another person to sing at another theatre, and refused to perform her contract with Lumley. The court refused to enforce Miss Wagner's positive engagement to sing at Lumley's theatre, but compelled performance of her promise not to sing elsewhere by an injunction.²

Here there was an express negative promise which the court could enforce, and it has been argued that an express *positive* promise gives rise to a negative undertaking not to do anything which should interfere with the performance of this promise. But the court is apparently disinclined to carry any further the

^a Where buildings have been erected contrary to the terms of an agreement an injunction for their removal has hitherto taken the form of an order that the buildings shall not be allowed to remain; it will henceforth be mandatory — that the buildings shall be pulled down. *Jackson v. Normanby Brick Co.*, (1899) 1 Ch. 438.

^b *Clegg v. Hands*, (1890) 44 Ch. D. 503.

^c (1852) 1 D.M. & G. 604.

¹ On the question of mutuality of remedy in specific performance, see 3 *Columbia Law Review*, 1.

² *Daly v. Smith*, (1874) 38 N.Y. Super. Ct. 158, s.c. 49 How. Pr. 150; *Duff v. Russell*, (1892) 60 N.Y. Super. Ct. 80, aff'd 133 N.Y. 678; *Philadelphia Base Ball Club v. Lajoie*, (1902) 202 Pa. 210. In some cases the injunction is refused because, the services not being unique, the plaintiff is regarded as having an adequate remedy at law by way of damages. *Cort v. Lussard*, (1889) 18 Ore. 221; *Carter v. Ferguson*, (1890, N.Y.) 58 Hun, 569; *Wm. Rogers Co. v. Rogers*, (1890) 58 Conn. 356; *Burney v. Ryle & Co.*, (1893) 91 Ga. 701.

principle of *Lumley v. Wagner*. It is said to be "an anomaly to be followed in cases like it, but an anomaly which it would be dangerous to extend."^a

In fact, we may lay down a general rule that contracts of personal service will not be dealt with either by decree for specific performance or by injunction.¹

A manager was employed by a company and agreed to "give the whole of his time to the company's business": afterwards he gave some of his time to a rival company.

"I think," said Lindley, L.J., "the court will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone: and whether it is attempted to enforce these contracts directly by a decree for specific performance or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will be done at all events to one of the parties, that the court declines in cases of this kind to grant an injunction, and leaves the party aggrieved to such remedy as he may have apart from the extraordinary remedy of injunction."^b

And this principle will be acted upon although a stipulation, affirmative in substance, is couched in a negative form. An employer stipulated with his manager that he would not require him to leave the employment except under certain circumstances. It was held that such an undertaking could not be enforced by an injunction to restrain the employer from dismissing the manager.^c

The limitations on the principle of *Lumley v. Wagner* are indicated in two later cases.

A traveler promised that he would serve a firm for ten years and would not, during that period, "engage or employ himself in any other business." An injunction to restrain him from accepting other employment was refused, and *Lumley v. Wagner* was distinguished on the ground of the special character of the services there promised.^d But if the contract for a term of service is of a special character, as for instance that of a confidential

^a Fry, *Specific Performance*, §§ 860-862 (5th ed.).

^b *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. (C.A.) 428.

^c *Davis v. Foreman*, [1894] 3 Ch. 654.

^d *Ehrman v. Bartholomew*, [1898] 1 Ch. 671.

¹ The American courts will imply a negative covenant from a positive, but will not generally enforce a negative covenant unless the services are shown to be in some sense unique. See cases in preceding note. The decision in *Lumley v. Wagner*, *supra*, may be criticised because it prevented the defendant from earning her living by singing for others without restoring her to her former position.

clerk in possession of trade secrets, an injunction will be granted to restrain him from accepting other employment, because the engagement contemplates the betrayal or injury of his first employer.^{a 1}

The contract of personal service would seem to be regarded by the courts as distinguishable from other contracts in respect of their remedy. In *The Metropolitan Electric Supply Co. v. Ginder*^b an express promise by the defendant to take the whole of his supply of electricity from the company was held to import a negative promise that he would take none from elsewhere, and an injunction was accordingly granted.

Two points remain to be noted:

(1) Where the contract fixes a sum as liquidated damages, the party aggrieved by breach of the contract cannot claim damages and an injunction as well, but must elect between the two.^{c 2}

(2) An equitable claim or counter-claim may be asserted in any Division of the High Court of Justice;³ but there are assigned to the Chancery Division, as a special department of its business, suits for "specific performance of contracts between vendors and purchasers of real estate, including contracts for leases."^{d 4} A suit for specific performance, if brought in any other than the Chancery Division, would be transferred to that Division by an order of the court.

^a *Robinson v. Heuer*, [1898] 2 Ch. (C.A.) 451.

^b [1901] 2 Ch. at p. 807.

^c *General Accident Corporation v. Noel*, [1902] 1 K.B. 377.

^d 36 & 37 Vict. c. 66, § 34, sub-s. 3.

¹ A covenant not to reveal trade secrets is generally implied in a contract of service. *Little v. Gallus*, (1896) 4 N.Y. App. Div. 569; *Harvey Co. v. Drug Co.*, (1902) 75 N.Y. App. Div. 103; *Simmons Hardware Co. v. Waibel*, (1891) 1 S.Dak. 488. An express covenant of this nature was enforced against an infant in *Mutual Milk &c. Co. v. Prigge*, (1906) 98 N.Y. Supp. 458, 112 App. Div. 652.

² Stipulating for liquidated damages does not destroy the basis for equity jurisdiction, but merely fixes the amount to be recovered in case the action is brought at law. *Diamond Match Co. v. Roeber*, (1887) 106 N.Y. 473; *O'Connor v. Tyrrell*, (1894) 53 N.J. Eq. 15. But see *contra*: *Hahn v. Concordia Society*, (1875) 42 Md. 460; *Martin v. Murphy*, (1891) 129 Ind. 464.

³ Equitable defenses can generally be interposed in those American states in which law and equity are administered by the same court. See *ante*, § 13, note; 1 Cyc. 737.

PART IV

CHAPTER XVI

Discharge of Contract

410. Modes in which contract discharged. We have now dealt with the elements which go to the formation of contract, with the operation of contract when formed, and with its interpretation when it comes into dispute. It remains to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. And in dealing with this part of the subject it will be proper to consider, not merely the mode in which the original contract may be discharged, but, in case of a breach of the contract, the mode in which the right of action arising thereupon may be extinguished.

The modes in which a contract may be discharged are these.

(a) It may be discharged by the same process which created it, mutual agreement.

(b) It may be performed; the duties undertaken by either party may be thereby fulfilled, and the rights satisfied.

(c) It may be broken; upon this a new obligation connects the parties, a right of action possessed by the one against the other.¹

(d) It may become impossible by reason of certain circumstances which are held to exonerate the parties from their respective obligations.²

(e) It may be discharged by the operation of rules of law upon certain sets of circumstances to be hereafter mentioned.

¹ The present editor prefers not to use the term "discharge" to describe the change in legal relations that takes place upon a breach of contract. The subject of breach has therefore been placed under a separate heading in a previous chapter. Upon breach by one party, a *secondary* duty to pay damages arises; but it does not follow from this that he is *discharged* wholly from his *primary* duty. Nor does a breach by one party necessarily discharge the other.

² A distinction must be made between impossibility of performing acts promised and impossibility of fulfilling a condition precedent. The former may discharge the liability and thus prevent any instant duty of performance or any secondary duty to pay damages. The subject of impossibility is dealt with as a whole, *ante*, §§ 373-380.

I. DISCHARGE OF CONTRACT BY AGREEMENT

411. Forms of discharge by agreement. Contract rests on the agreement of the parties: as it is their agreement which binds them, so by their agreement they may be loosed.

1. *Rescission*

412. Mutual discharge of bilateral contract. A contract may be discharged by agreement between the parties that it shall no longer bind them. This is a rescission of the contract.

Such an agreement is formed of mutual promises, and the consideration for the promise of each party is the abandonment by the other of his rights under the contract. The rule, as often stated, that "a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration," must be understood to mean that, where the contract is *executory*, no further consideration is needed for an agreement to rescind than the discharge of each party by the other from his liabilities.¹

413. Discharge of unilateral contract. There seems to be no authority for saying that a contract, executed upon one side, can be discharged before breach, without consideration; that where A has done all that he was bound to do and the time for X to perform his promise has not yet arrived, a bare waiver of his claim by A would be an effectual discharge to X.²

According to English law the right to performance of a contract can be abandoned only by release under seal,³ or for con-

¹ Kellett v. Robie, (1898) 99 Wis. 303; An agreement for rescission of contract requires all the elements of an agreement for formation of contract. Wheeler v. New Brunswick &c. R., (1885) 115 U.S. 29, 34. Mutual abandonment may be inferred. Hobbs v. Columbia Falls Brick Co., (1892) 157 Mass. 109; Chouteau v. Jupiter Iron Works, (1887) 94 Mo. 388. The promise of A to discharge B is a consideration for B's promise to discharge A. "The surrender of their mutual rights is sufficient consideration." Dreifus &c. Co. v. Salvage Co., (1900) 194 Pa. 475; Spier v. Hyde, (1903) 78 N.Y. App. Div. 151.

² But the promisee may make a gift to the debtor or promisor of the outstanding obligation. Gray v. Barton, (1873) 55 N.Y. 68; McKensie v. Harrison, (1890) 120 N.Y. 260. This requires a delivery of some document that is the symbol of the right. A mere promise to discharge in the future or a mere statement "I do now discharge" is not effective as a discharge. Garnsey v. Garnsey, (Me. 1917) 101 Atl. 447.

³ A release under seal needs no consideration. See *ante*, § 88. Statutory changes as to seals (see § 88, note 1) have sometimes been so construed as to make a release under seal ineffective. Wabash Western Ry. v. Brow, 65 Fed. Rep. 941. A covenant not to sue does not discharge the obligation; but as a personal defense it may be pleaded in bar of an action between the parties in order to avoid circuity of action. Chicago v. Babcock, (1892) 143 Ill. 358; Phelps v. Johnson, (1811, N.Y.) 8 Johns. 54.

sideration. The plea of "waiver" under the old system of pleading set up an agreement between the parties to waive a contract, an agreement consisting of mutual promises, the consideration for which is clearly the relinquishment of a right by each promisee.^a Discharge by waiver, then, requires either a mutual abandonment of claims, or else a new consideration for the waiver.¹

In *King v. Gillett*,^b the plaintiff sued for breach of a promise of marriage; Gillett pleaded that before breach he had been *exonerated and discharged* by King from the performance of his promise. The court held that the plea was good in form; "yet we think," said Alderson, B., "that the defendant will not be able to succeed upon it, . . . unless he proves a *proposition to exonerate on the part of the plaintiff, acceded to by himself*; and this in effect will be a rescinding of the contract."²

Dobson sued Espie for non-payment of deposit money due upon a sale of land. Espie pleaded that, before breach of his promise to pay, Dobson had given him *leave and license* not to pay. The court held that such a plea was inapplicable to a suit for the breach of a contract, and that the defendant should have pleaded an *exoneration and discharge*.^c It is difficult to see why the pleader did not adopt the latter form of plea, unless it were that (according to the reasoning of Alderson, B., in *King v. Gillett*) an exoneration means a *promise to exonerate*, which like any other promise needs consideration to support it. Here the plea did not show that Dobson was to obtain anything for his alleged waiver: neither the relinquishment of a claim, nor any fresh consideration.

Finally, we have the express authority of Parke, B., in *Foster v. Dawber*,^d for saying that an executed contract, i.e., a contract in which one of the parties has performed all that is due from him, cannot be discharged by a parol waiver.

^a Bullen and Leake, *Proc. of Pleadings* (3d ed.), Tit. Waiver; Rescission.

^b (1840) 7 M. & W. 55.

^c *Dobson v. Espie*, (1857) 2 H. & N. 79.

^d (1851) 6 Erch. 551.

¹ *Collyer v. Moulton*, (1868) 9 R.I. 90; *Hale v. Dressen*, (1899) 76 Minn. 183; *Garnsey v. Garnsey*, (1917, Me.) 101 Atl. 447. But see *Kelly v. Bliss*, (1882) 54 Wis. 187; *Hathaway v. Lynn*, (1889) 75 Wis. 186.

The term "waiver" is used very broadly and very loosely in the law. It is commonly applied to almost any surrender or loss, by voluntary action, of rights, privileges, powers, or immunities. This usage is far broader than that in the case of the term *rescission*.

² See *Kellett v. Robie*, *supra*, where the sole question seems to be whether there was the necessary mutual agreement for releases.

"It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. *But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts.*"

414. **Exceptional case of negotiable instruments.** This last sentence deals with an exception to the principle just laid down, for it was a rule of the law merchant imported into the common law that the holder of a bill of exchange or promissory note might waive and discharge his rights. Such waiver needed no consideration, nor did it need to be expressed in any written form.¹

The Bills of Exchange Act has given statutory force to this rule of common law, subject to the provision that the waiver must be in writing or the bill delivered up to the acceptor.*²

2. Substituted contract

415. **Distinguished from postponement of performance.** A contract may be discharged by such an alteration in its terms as substitutes a new contract for the old one. The old contract may be expressly waived in the new one, or waiver may be implied by the introduction of new terms or new parties.³

α 45 & 46 Vict. c. 61, § 62.

¹ Independently of statute, no such exception is recognized in the United States unless the note or bill is surrendered. *Kidder v. Kidder*, (1859) 33 Pa. 268; *Franklin Bank v. Severin*, (1890) 124 Ind. 317; *Bragg v. Danielson*, (1886) 141 Mass. 195; *Crawford v. Millsbaugh*, (1816, N.Y.) 13 Johns. 87. The surrender of the note or bill operates by way of an executed gift. *Slade v. Mutrie*, (1892) 156 Mass. 19. See the matter of waiver discussed at large in *Jaffray v. Davis*, (1891) 124 N.Y. 164.

² The Negotiable Instruments Law, § 122 (N.Y. § 203) now provides that a written renunciation shall discharge a party to a negotiable instrument the same as a surrender of the instrument itself.

³ A bilateral contract may before breach be discharged or varied by substituting a new one for it. *McCreery v. Day*, (1890) 119 N.Y. 1; *McNish v. Reynolds &c. Co.*, (1880) 95 Pa. 483; *Smith v. Kelly*, (1897) 115 Mich. 411; *Montgomery v. American Cent. Ins. Co.*, (1900) 108 Wis. 146.

If in a bilateral contract one party refuses performance, it is sometimes held that a new contract may be made which will operate as a rescission of the old and a substitution of the new. *Rollins v. Marsh*, (1880) 128 Mass. 116; *Dreifus &c. Co. v. Salvage Co.*, (1900) 194 Pa. 475. See *ante*, § 138, notes.

A unilateral contract may also be discharged by substituting for it a new contract resting upon sufficient consideration. *Spier v. Hyde*, (1903) 78 N.Y. App. Div. 151; *Harrison v. Polar Star Lodge*, (1886) 116 Ill. 270. And

But the intention to discharge the first contract must be made clear in the inconsistency of the new terms with the old. A mere postponement of performance, for the convenience of one of the parties, does not discharge the contract.

This question has often arisen in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, then refuses to accept the goods at all, and then alleges that the contract was discharged by the alteration of the time of performance; that a new contract was thereby created, and that the new contract is void for non-compliance with statutory requirements as to form.

But the courts have always recognized "the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another," and will not regard the latter as affecting the rights of the parties further than this, that if a man asks to have performance of his contract postponed, he does so at his own risk.^a For if the market value of the goods which he should have accepted at the earlier date has altered at the latter date, the rate of damages may be assessed, as against him, either at the time when the performance should have taken place, and when by non-performance the contract was broken, or when he ultimately exhausted the patience of the vendor, and definitely refused to perform the contract.^{b 1}

416. **Substituted terms.** A contract may be discharged by substantial alteration of its terms.

A undertook building operations for X, which were to be completed by a certain date, or a sum to be paid as compensation for delay. While the building was in progress an agreement was made between the parties for additional work, by which it became impossible that the whole of the operations should be concluded within the stipulated time. It was held that the subsequent agreement was so far inconsistent with the first,

^a *Hickman v. Haynes*, (1875) L.R. 10 C.P. 606.

^b *Ogle v. Earl Vane*, (1868) L.R. 2 Q.B. 275, & 3 Q.B. 272. Willes, J., in giving judgment in the Exchequer Chamber in the case of *Ogle v. Earl Vane*, L.R. 3 Q.B. 279, holds that such forbearance on request constitutes an agreement, which for want of consideration was not actionable, but which might affect the measure of damages. He calls it an accord without a satisfaction. As to the nature of Accord and Satisfaction, see § 431, *post*.

there may be an accord and satisfaction of a claim for a breach of contract by the acceptance of a new executory contract in the place of the claim. *Nassoiy v. Tomlinson*, (1896) 148 N.Y. 326; *Simmons v. Clark*, (1870) 56 Ill. 96; *Perdew v. Tillma*, (1901) 62 Neb. 865. See § 431, *post*.

¹ See *Barton v. Gray*, (1885) 57 Mich. 622.

as to amount to a waiver of the sum stipulated to be paid for delay.^{a 1}

417. Substituted parties. Novation. A contract may be discharged by the introduction of new parties.

If *A* has entered into a contract with *X* and *M*, and these two agree among themselves that *M* shall retire from the contract and cease to be liable upon it, *A* may (1) insist upon the continued liability of *M*, or (2) he may treat the contract as broken and discharged, or (3) by continuing to deal with *X* after he becomes aware of the retirement of *M* he may enter into a new contract to accept the sole liability of *X*; he cannot then hold *M* to the original contract.

"If one partner goes out of a firm and another comes in, the debts of the old firm may, by the consent of all the three parties — the creditor, the old firm, and the new firm — be transferred to the new firm," and this consent may be implied by conduct, if not expressed in words or writing.^{b 2}

3. Provisions for discharge contained in the contract itself

418. Conditions and options. A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination under certain circumstances. These circumstances may be the non-fulfillment of a condition precedent; the occurrence of a condition subsequent; or the exercise of an option [a *power*] to determine the contract, reserved to one of the parties by its terms.

419. Non-fulfillment of a condition precedent. The first of these three cases is somewhat near akin to discharge of contract by *breach*. But there is a difference between a non-fulfillment contemplated by the parties, the occurrence of which shall, it is agreed, make the contract determinable at the option of one, and a *breach*, or non-fulfillment not contemplated or provided for by the parties.³

^a *Thornhill v. Nests*, (1860) 8 C.B., N.S. 831.

^b *Per Parks, B., Hart v. Alexander*, (1837) 2 M. & W. 484. In the case of partnership these rules are substantially embodied in the Partnership Act of 1890, § 17.

¹ See cases cited in preceding section.

² *Collyer v. Moulton*, (1868) 9 R.L. 90; *Millerd v. Thorn*, (1874) 56 N.Y. 402. The assent of the creditor to the substitution must be established. *Ayer v. Kilner*, (1889) 148 Mass. 468. See on novation, § 306, *ante*.

³ The non-fulfillment of a condition precedent may not be a breach of the contract at all; but they are alike in this, that neither one amounts to a discharge of all contractual relations. Therefore both are dealt with herein

Head bought a horse of Tattersall. The contract of sale contained, among others, these two terms: that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should be at liberty to return it by the evening of a specified day. The horse did not answer to its description and had never been hunted with the Bicester hounds. It was returned by the day named, but had in the meantime been injured, though by no fault of Head. Tattersall disputed, but without success, Head's right to return the horse.¹

"The effect of the contract," said Cleasby, B., "was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revert in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property reverted, and he must therefore bear the loss."^a

420. Occurrence of a specified event. In the second case the parties introduce a provision that the fulfillment of a condition or the occurrence of an event shall discharge either one of them or both from further liabilities under the contract.

Such a provision is called a *condition subsequent*; it is well illustrated by a bond, which is a promise subject to, or defeasible upon, a condition expressed in the bond.²

It may be further illustrated by the "excepted risks" of a charter-party.^b The ship-owner agrees with the charterer to make the voyage on the terms expressed in the contract, "the

^a *Head v. Tattersall*, (1871) L.R. 7 Ex. 7, 14.

^b For the form of a charter-party, see Appendix.

in preceding chapters. Either the non-fulfillment of a condition precedent or a breach by *A* may prevent *B* from being under any duty to perform, but neither one will discharge *B's* rights or *A's* correlative duties.

¹ The legal relations of Head are as follows: (1) a *privilege* of not paying the price (or, in case the price has already been paid, a *right* to repayment); (2) a *privilege* of returning the horse (and, on refusal by the other party, a privilege of setting the horse at large); (3) a *power* to revert title to the horse in the original owner.

² It has been shown previously (§ 359) that the term *condition subsequent* is used in various senses. The condition of a bond may be described properly as either subsequent or precedent, depending upon the legal relation to which it is referred. The fulfillment of the condition, as it is expressed, is *subsequent* to the primary liability and terminates it. But at the same time the non-fulfillment of the expressed condition is a condition *precedent* to any right of action on the bond. The same is true of the "excepted risks" in the contracts of carriers. It is quite possible, however, to provide that a certain event shall be a condition precedent to a secondary obligation without making its non-occurrence a discharge of the primary obligation. See Arthur L. Corbin, "Discharge of Contracts," 22 *Yale Law Journal*, 513.

act of God, the King's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatsoever nature or kind, during the said voyage, *always excepted*." The occurrence of such an excepted risk releases the ship-owner from a strict performance of his contract; and if it should take place even after performance has begun, and should be of a nature to frustrate the commercial purpose of the adventure, the parties are altogether discharged.

Geipel chartered a vessel belonging to Smith to go to a spout, load a cargo of coals, and proceed thence to Hamburg: the contract contained the usual excepted risks. Before anything was done under it war broke out between France and Germany; the port of Hamburg was blockaded by the French fleet; and Smith, regarding a blockade as a "restraint of princes," refused even to load a cargo, and treated the contract as discharged. Geipel sued him for non-fulfillment of such of the terms as would not have involved the risk; but the court held that an excepted risk had occurred, had made performance impossible, and that the ship-owner was not bound to fulfill the preliminaries of the contract.^{a 1}

Similar conditions enter into the contract made by a common carrier. Such a carrier has a common-law liability imposed on him arising from the nature of his business, and is said to warrant or insure the safe delivery of goods entrusted to him; and by this we mean that he promises to bring the goods safely to their destination or to indemnify the owner for their loss or injury, whether happening through his own default or not. But his promise is defeasible upon the occurrence of certain excepted risks, — "The act of God," the "King's enemies," and also injuries arising from defects inherent in the thing carried. This qualification is implied in every contract made with a common carrier, and the occurrence of the risks exonerates him from liability for loss thereby incurred.^b

The "act of God" is a phrase which needs explanation.^c Its meaning is to some extent defined in *Nugent v. Smith*.^c

^a *Geipel v. Smith*, (1872) L.R. 7 Q.B. 404.

^b *Lister v. Lancashire and Yorkshire Railway Co.*, [1903] 1 K.B. 878.

^c (1876) 1 C.P.D. 423.

¹ *Graves v. The Calvin S. Edwards*, (1892) 50 Fed. 477; *Brauer v. Campana Navigacion La Flecha*, (1895) 66 Fed. 776; *The Edwin I. Morrison*, (1894) 153 U.S. 199; *New York Life Ins. Co. v. Statham*, (1876) 93 U.S. 24.

² A moment's thought will show that there is an inherent difficulty in determining what is an act of God. The question here turns, just as in the case of *negligence*, upon how much foresight and preventive action is to be required of *men*.

The defendant, a common carrier by sea, received from the plaintiff a mare to be carried from London to Aberdeen. In the course of the voyage the ship met with rough weather, and the mare, being much frightened and struggling violently, suffered injuries of which she died. No negligence was proved against the defendant.

It was argued that the weather, though rough, was not so violent or unusual as to be an "Act of God," and that the struggling of the mare was not of itself enough to show that she was injured from her own inherent vice but the Court of Appeal (reversing the decision of the Common Pleas) held that the defendant was not liable.

"The 'act of God,'" said James, L.J.,^a "is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected of him. In this case the defendant has made this out."

And Mellish, L.J., said,^b "A carrier does not insure against acts of nature and does not insure against defects in the thing carried itself, but in order to make out a defence he must be able to prove that either cause taken separately or both taken together, formed the sole and direct and irresistible cause of the loss."

A common carrier is therefore discharged where an excepted risk occurs if he show that the loss could by no reasonable precaution under the circumstances have been prevented.

This exception from the general liability of the common carrier of goods is a known and understood term in every contract which he makes. The discharge hence arising must be distinguished from discharge arising from a subsequent impossibility of performance not expressly provided against in the terms of the contract. With this we shall deal hereafter.¹

421. Discharge optional with notice. Thirdly, a continuing contract may contain a provision making it determinable at the

^a At p. 444.

^b At p. 441.

¹ *Railroad Co. v. Reeves*, (1869, U.S.) 10 Wall. 176. Provisions are usually inserted in insurance policies that in case of the increase of the risk by any act of the insured, as by leaving the property unoccupied, the policy shall be discharged. *Moore v. Phoenix Ins. Co.*, (1882) 62 N.H. 240; *Kyte v. Commonwealth Union Ins. Co.*, (1889) 149 Mass. 116. Insolvency of a buyer gives a seller a privilege of stopping delivery, in the absence of a tender of the price in cash or of sufficient security, even though the sale was on credit. *Ex parte Chalmers*, (1873) L.R. 8 Ch. App. 289; *Rappleve v. Racine Seeder Co.*, (1890) 79 Iowa, 220.

option of one of the parties upon certain terms. Such a provision exists in the ordinary contract of domestic service; the servant can terminate the contract by a month's notice, the master by a month's notice or the payment of a month's wages.^a And similar terms may be incorporated with other contracts between employer and employed, either expressly or by the usage of a trade.^{b 1}

4. Formalities necessary to discharge

422. **Form of discharge by agreement.** As regards the form needed for the expression of an agreement which purports to discharge an existing contract, there is a general rule that a contract must be discharged in the same form as that in which it was made. At common law a contract under seal could only be discharged by agreement expressed under seal; a parol contract may be discharged by parol.

(1) *In case of contract under seal.* But while at common law parties to a deed could only discharge their obligations by deed, they might make a parol contract creating obligations separate from and at variance with the deed: giving a right of action to which the deed furnishes no answer: and affording, by performance, an equitable answer to an action on the deed.²

Since the Judicature Acts the rule of equity prevails, and an executed parol contract will discharge a deed.^c

(2) *In case of parol contracts.* A parol or simple contract, whether it be in writing or no, may be discharged by writing or

^a Nowlan v. Ablett, (1835) 2 C.M. & R. 54.

^b Parker v. Ibbetson, (1856) 4 C.B. (N.S.) 347.

^c Steeds v. Steeds, (1889) 22 Q.B.D. 537.

¹ No such provision attaches to contracts of service in this country. The so-called *discharge* in cases of this sort is identical with discharge by full performance. The parties have promised nothing more than that they will perform until one month after notice.

² A parol contract which undertakes to discharge or vary a specialty is effective if acted upon. *Munroe v. Perkins*, (1830, Mass.) 9 Pick. 298; *McCreery v. Day*, (1890) 119 N.Y. 1; *McKenzie v. Harrison*, (1890) 120 N.Y. 260; *Stees v. Leonard*, (1874) 20 Minn. 494. Some jurisdictions uphold the new contract while still executory. *Canal Co. v. Ray*, (1879) 101 U.S. 522; *Hastings v. Lovejoy*, (1885) 140 Mass. 261. But others refuse to give effect to an unexecuted variation of a sealed instrument unless the new agreement is also under seal. *McKenzie v. Harrison*, *supra*; *McMurphy v. Garland*, (1867) 47 N.H. 316; *Hersog v. Sawyer*, (1883) 61 Md. 344. In states where sealed instruments are by statute put on the same basis as simple written contracts the substituted contract need not be sealed in order to be effective. *Barton v. Gray*, (1885) 57 Mich. 622; *Blagbourne v. Hunger*, (1894) 101 Mich. 375.

by word of mouth. The agreement of the parties is evidenced by the writing in which it is expressed. The *terms* of that agreement in writing are conclusively determined by the written words; but the legally operative facts are the expressions of intention of the parties, not merely the writing which is one instrument of that expression; and the resulting legal relations may be discharged "*eo ligamine quo ligatum est*," by a parol expression of the intention to put an end to them.

Even where statute requires a contract to be in writing there is authority for saying that waiver may take place by word of mouth.^a ¹ But if the discharge be not a simple rescission, but such an implied discharge as arises from the making of a new agreement inconsistent with the old one, then there must be writing in accordance with the requirements of the statute.²

II. DISCHARGE BY MERGER

423. Merger. If a higher security be accepted in the place of a lower, the security which in the eye of the law is inferior in operative power, *ipso facto*, whatever may be the intention of the parties, merges and is extinguished in the higher.³

We shall later see another instance of this in the case of judgment recovered which extinguishes by *merger* the right of action arising from breach of contract.⁴

^a *Goman v. Salisbury*, (1684) 1 Vern. 240; *Goss v. Lord Nugent*, (1833) 5 B. & A. 66.

¹ *Wulschner v. Ward*, (1888) 115 Ind. 219; *Buel v. Miller*, (1827) 4 N.H. 196.

² *Swain v. Seamens*, (1869, U.S.) 9 Wall. 254, 271; *Walter v. Bloede Co.*, (1901) 94 Md. 80; *Warren v. Mayer Mfg. Co.*, (1900) 161 Mo. 112; *Clark v. Fey*, (1890) 121 N.Y. 470. Cf. *Cummings v. Arnold*, (1842, Mass.) 3 Met. 486; *Stearns v. Hall*, (1851, Mass.) 9 Cush. 31. If the new contract is performed and the performance accepted, the original contract is satisfied. *Long v. Hartwell*, (1870) 34 N.J. L. 116; *Burns v. Real Estate Co.*, (1892) 52 Minn. 31. The statute does not require the new contract to be in writing merely because the old one was required to be. If the new contract, as amended, is not in itself within the statute, it is effective for all purposes without any writing. The new agreement may be effective as a rescission of the old one, even though within the statute itself and not enforceable, provided the intent to rescind and the intent to make a new contract can be shown to be independent. *Morris v. Baron*, [1918] A.C. 1, Ann. Cas. 1918 C, 1197 and note.

³ This discharge of an obligation by *merger* appears to be identical with a discharge by substituted contract. In both cases there have come into existence new operative facts the legal result of which is to substitute a new obligation for a former one. The term *merger*, however, is used only in the cases mentioned in the text above.

⁴ See § 432, *post*.

And, in like manner, if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged.¹

The rules governing this process may be thus summarized:

(a) The two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security taken in addition to one similar in character will not affect its validity, unless there be discharge by substituted agreement.*

(b) The subject-matter of the two securities must be identical.^{b 2}

(c) The parties must be the same.

The rights and liabilities under a contract are also extinguished if they become vested by assignment or otherwise in the same person, for a man cannot contract with himself.³ Where a term of years becomes vested in the immediate reversioner, it merges in the reversion and all covenants attached to it are extinguished,^c though by a rule of Equity, which since the Judicature Acts applies in all courts, the intention of the parties may operate to prevent the occurrence of a merger,^d and similarly, a bill of exchange is discharged, if the acceptor should eventually become the holder of it.^e

III. DISCHARGE BY PHYSICAL ALTERATION OF DOCUMENT

424. Alteration or loss of a written instrument. If a deed or contract in writing be altered by addition or erasure, it is discharged, subject to the following rules: ⁴

^a *Higgen's case*, (1805) 6 Co. Rep. 45b.

^b *Holmes v. Bell*, (1841) 3 M. & G. 213.

^c *Capital and Counties' Bank v. Rhodes*, [1903] 1 Ch. 631.

^d 45 & 46 Vict. c. 61, § 61.

^e *Nash v. De Freville*, [1900] 2 Q.B. 72.

¹ *Clifton v. Jackson Iron Co.*, (1889) 74 Mich. 183; *Schoonmaker v. Hoyt*, (1896) 148 N.Y. 425; *Slocum v. Bracy*, (1893) 55 Minn. 249.

² *Cavanaugh v. Casselman*, (1891) 88 Cal. 543; *Stockton v. Gould*, (1892) 149 Pa. 68. This does not mean that the new legal relations are identical with the old ones, but only that the new instrument must indicate an intention to effect a substitution and to terminate the old legal relations, or its operative effect must be inconsistent with those former relations.

³ To say that "they became vested" is purely figurative language. A fact that would operate as an assignment where a third person is a party operates only as an extinguishment where only the two contracting parties are involved. If *A* has a claim against *B*, an "assignment" of the claim to *B* is merely a discharge; for legal relations are always relations between persons, and here there is no other person against whom *B* has a claim. The former relations between *A* and *B* included a right in *A* and a duty in *B*. The new relations are no-right in *A* and privilege in *B*.

⁴ If the alteration is fraudulent the original debt is also extinguished.

(a) The alteration must be made by a party to the contract, or by a stranger while the document is in the possession of a party to the contract and for his benefit.^{a 1}

Alterations by accident or mistake occurring under such circumstances as to negative the idea of intention will not invalidate the document.^{b 2}

(b) The alteration must be made without the consent of the other party, else it would operate as a new agreement.^{c 3}

(c) The alteration must (it seems) be made in a material part.^{c 4} What amounts to a material alteration must needs depend upon the character of the instrument, and it is possible for the character of an instrument to be affected by an alteration which does not touch the contractual rights set forth in it. In a Bank of England note the promise to pay made by the bank is not touched by an alteration in the number of the note; but the fact that a bank note is a part of the currency, and that the number placed on it is put to important uses by the bank and by the public for the detection of forgery and theft, causes an alteration in the number to be regarded as material and to invalidate the note.^{d 5}

An alteration, therefore, to effect a discharge of the contract, need not be an alteration of the *contract*, but must be "an alteration of the instrument in a material way."^{e 6} The Bills of Ex-

^a *Pattinson v. Luckley*, (1875) L.R. 10 Ex. 330.

^b *Wilkinson v. Johnson*, (1824) 3 B. & C. 428.

^c In *Crookewit v. Fietober*, (1857) 1 H. & N. 893, 912, the rule appears to have been stated in terms which would imply that any alteration would effect a discharge; but this seems unreasonable.

^d *Suffell v. Bank of England*, (1882) 9 Q.B.D. 555.

Smith v. Mace, (1863) 44 N.H. 553. But if the alteration is without fraudulent intent an action will lie upon the original consideration. *Clough v. Seay*, (1878) 49 Iowa, 111; *Owen v. Hall*, (1888) 70 Md. 97; *Savings Bank v. Shaffer*, (1879) 9 Neb. 1. See 2 Cyc. 183-85.

¹ Alteration by a stranger will not discharge the obligation in most American states. *Gleason v. Hamilton*, (1893) 138 N.Y. 353; 2 Cyc. 151-52. But see *Negotiable Inst. Law*, § 124 (N.Y. § 205).

² *Brett v. Marston*, (1858) 45 Me. 401; *Russell v. Longmoor*, (1890) 29 Neb. 209; 2 Cyc. 146.

³ *Stewart v. Bank*, (1879) 40 Mich. 348; *People v. Call*, (1845, N.Y.) 1 Den. 120; 2 Cyc. 156, note 55.

⁴ For a collection of instances see 2 Cyc. 193-225. See *McRaven v. Crisler*, (1876) 53 Miss. 542.

⁵ *Contra*: *Commonwealth v. Emigrant Bank*, (1867) 98 Mass. 12; *Birdsall v. Russell*, (1864) 29 N.Y. 220; *Elizabeth v. Force*, (1878) 29 N.J. Eq. 587; *Wylie v. Ry.*, (1890) 41 Fed. 623; *Tennessee Bank Note Holders v. Funding Board*, (1885, Tenn.) 16 Lea, 46.

⁶ Note the use of the word "contract" here to refer to the legal relations as distinguished from the document. See *ante*, § 9, note. The *alteration* dis-

change Act of 1882^a provides that a bill shall not be avoided as against a holder in due course, though it has been materially altered, "if the alteration is not apparent": and the provisions of the Act respecting bills apply to promissory notes "with the necessary modifications." These last words have been held to exclude Bank of England notes, and therefore do not affect the decision in *Suffell's case*.^{b 1}

The loss of a written instrument only affects the rights of the parties in so far as it may occasion a difficulty of proof;^{c 2} but an exception to this rule exists in the case of bills of exchange and promissory notes. If the holder of the instrument lose it, he loses his rights under it, unless he offer to the party primarily liable upon it an indemnity against possible claims.^{d 3}

IV. DISCHARGE OF CONTRACT BY PERFORMANCE

425. Unilateral and bilateral contracts. We must distinguish performance which discharges one of two parties from his liabilities under a contract, and performance which discharges the obligation in its entirety.

Where a promise is given upon an executed consideration, the performance of his promise by the promisor discharges the contract: all has been done on both sides that could be required to be done under the contract.

Where one promise is given in consideration of another, performance by one party does no more than discharge him who has performed his part. Each must have done his part in order that performance may be a *solutio obligationis*, and so if one has done his part and not the other, the contract is still in existence

^a 46 & 47 Vict. c. 61, § 64.

^b *Ibid.* § 89. *Leeds Bank v. Walker*, (1883) 11 Q.B.D. 84.

^c Where the documents are proved to be lost, parol evidence may be given of the contents of a written acknowledgment of a debt barred by the Statute of Limitation. *Haydon v. Williams*, (1830) 7 Bing. 163. In the case of a memorandum under the Statute of Frauds the matter is not clear. *Nichol v. Bestwick*, (1858) 28 L.J. Ex. 4.

^d *Hansard v. Robinson*, (1827) 7 B. & C. 90. *Confians Quarry Co. v. Parker*, (1867) L.R. 3 C. P. 1.

cussed in the present section always refers to some physical change in a document. For an alteration to effect a discharge it is not always necessary that it should be of a kind to evidence an *intent* to vary the legal relations then existing.

¹ See Negotiable Instruments Law, §§ 124, 125 (N.Y. §§ 205, 206).

² If a negotiable instrument is intentionally canceled no action can be maintained. *Blade v. Noland*, (1834, N.Y.) 12 Wend. 173; *Larkin v. Hardenbrook*, (1882) 90 N.Y. 333. See Negotiable Instruments Law, §§ 119, 123 (N.Y. §§ 200, 204).

³ *McGregory v. McGregor*, (1871) 107 Mass. 543; *Des Arts v. Leggett*, (1858) 16 N.Y. 582.

and may be discharged in any one of the ways we have mentioned.¹

Whether the alleged performance is a discharge to the party concerned must be a question to be answered, first by ascertaining the *construction* of the contract, so as to see what the parties meant by performance, and then by ascertaining the facts, so as to see whether that which has been done corresponds to that which was promised.

But two sorts of performance should be briefly noticed: these are payment and tender.

1. *Payment*

426. Original; substituted; after breach. Payment may be a discharge of the original contract between the parties, or of an agreement substituted for such contract.

If in a contract between *A* and *X* the legal duty of *X* requires the payment of a sum of money in a certain way or at a certain time, such a payment discharges *X* by the performance of his agreement.²

Or if *X* being bound to perform various acts under his contract, wishes instead to pay a sum of money, or, having to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with *A* to accept the proposed payment in lieu of that to which he may have been entitled under the original contract. The new contract discharges the old one, and payment is a performance of *X*'s duties under the new contract, and, for him, a consequent discharge.³

Again, where one of two parties has made default in the performance of his part of the contract, so that a right of action accrues to the other, the obligation thus formed may be discharged by *accord and satisfaction*, an agreement the consideration for which is usually a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other. But note that an agreement based on an

¹ After performance by one, the duty of the other does indeed still exist. To say that the *contract* still exists overlooks the truth that contract is not a *thing* or a simple legal relation. After performance by one party, some of the former legal relations still exist.

² Payment extinguishes the debt, and it cannot be revived. *Marvin v. Vedder*, (1825, N.Y.) 5 Cow. 671; *Lancey v. Clark*, (1876) 64 N.Y. 209.

³ *Bickle v. Beseke*, (1864) 23 Ind. 18. The duties under the old contract are discharged by a *substituted contract*; the duties under this new one are discharged by performance.

executory consideration only will not discharge the obligation; the consideration must be *executed*, before a defense of accord and satisfaction can be successfully raised.^{a 1}

Payment, then, may be performance (1) of an original contract, or (2) of a substituted contract, or (3) of a contract in which payment is the consideration for the renunciation of a right of action.

427. Negotiable instrument as payment. A negotiable instrument may be given in payment of a sum due, whether as the performance of a contract or in satisfaction for the breach of it; and the giving of such an instrument in payment of a liquidated or unliquidated claim is the substitution of a new agreement for the old one; but it may affect the relations of the parties in either one of two different ways. The giver of the instrument may be discharged from his previous obligation either absolutely or conditionally.

A may take the bill or note, and promise, in consideration of it, expressly or impliedly to discharge X altogether from his duties and liabilities. In such a case he relies upon his rights conferred by the instrument, and if it be dishonored, must sue on it, and cannot revert to the original cause of action.^b But the presumption, where a negotiable instrument is taken in lieu of a money payment, is, that the parties intended it to be a conditional discharge only. Their position then is this: A, having certain rights against X, has agreed to take a negotiable instrument instead of immediate payment, or immediate enforcement of his right of action; so far X has satisfied A's claim. But if the bill be dishonored at maturity, the consideration for A's promise has wholly failed and his original rights are restored to him. The agreement is "defeasible upon condition subsequent"; the payment by X which is the consideration for the promise by A is not absolute, but may turn out to be, in fact, no payment at all.^c

Payment then consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge

^a Bayley v. Homan, (1837) 3 Bing. N.C. at p. 390.

^b Sard v. Rhodes, (1836) 1 M. & W. 153.

^c Sayer v. Wagstaff, (1844) 5 Beav. 423.

¹ "An agreement based upon an executory consideration" is a perfectly good discharge if it is so agreed. It is then a substituted contract. The reason why an "executory accord" is not a discharge is that it was not so agreed. See *post*, "Accord and Satisfaction," § 431.

of his right absolutely, or subject to a condition (which will be presumed in the absence of expressions to the contrary) that, if payment be not made when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract or rights to satisfaction for the breach of one.^{a 1}

2. Tender

428. Two forms of tender. Tender is attempted performance; and the word is applied to attempted performance of two kinds, dissimilar in their results. It is applied to a performance of a promise to do something, and of a promise to pay something. In each case the performance is frustrated by the act of the party for whose benefit it is to take place.

(1) *Tender of goods.* Where in a contract for the sale of goods the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.^{b 2}

(2) *Tender of payment.* But where the performance due consists in the payment of a sum of money, a tender by the debtor, although it may form a good defense to an action by the creditor, does not constitute a discharge of the debt.³

^a Robinson v. Read, (1829) 9 B. & C. at p. 455; Sayer v. Wagstaff, (1844) 5 Beav. 423.
^b Startup v. Macdonald, (1843) 6 M. & G. 593; 56 & 57 Vict. c. 71, § 37.

¹ It is a question of intent whether a negotiable instrument is taken as absolute payment. In general the American courts follow the English in holding that the presumption, in absence of proof to the contrary, is that the instrument is taken conditionally. Ford v. Mitchell, (1862) 15 Wis. 304; The Kimball, (1865, U.S.) 3 Wall. 37; Cheltenham &c. Co. v. Gates Iron Works, (1888) 124 Ill. 623. A few states hold that the presumption is that it is taken absolutely. Smith v. Bettger, (1879) 68 Ind. 254; Dodge v. Emerson, (1881) 131 Mass. 467. But in either case if there is any evidence of intent the question becomes one of fact for the jury; if there is no evidence the presumption must control. Cheltenham &c. Co. v. Gates Iron Works, *supra*; Briggs v. Holmes, (1888) 118 Pa. 283; Hall v. Stevens, (1889) 116 N.Y. 201. Many cases hold, however, that when a third person's negotiable obligation is taken for a contemporaneous debt, the presumption is that there was a barter, or exchange of property. Whitbeck v. Van Ness, (1814, N.Y.) 11 Johns. 409; Noel v. Murray, (1855) 13 N.Y. 167.

² If a debt is payable in goods, a tender of the goods properly separated and distinguished will discharge the debt, the title to the goods passing to the creditor. Barney v. Bliss, (1824, Vt.) 1 D. Chip. 399; Hambel v. Tower, (1863) 14 Iowa, 530; Dewees v. Lockhart, (1847) 1 Tex. 535.

³ Cowles v. Marble, (1877) 37 Mich. 158; Bank v. Davidson, (1874) 70 N.C. 118.

The debtor is bound in the first instance "to find out the creditor and pay him the debt when due":^a if the creditor will not take payment when tendered, the debtor must nevertheless continue always ready and willing to pay the debt. Then, when he is sued upon it, he can plead that he tendered it, but he must also pay the money into court.^{b 1}

If he proves his plea, the plaintiff gets nothing but the money which was originally tendered to him, while the defendant gets judgment for his costs of defense, and so is placed in as good a position as he held at the time of the tender.

Tender, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place, and mode of payment. And the tender must be an offer of money produced and accessible to the creditor, not necessarily of the exact sum, but of such a sum as that the creditor can take exactly what is due without being called upon to give change.^{c 2}

V. DISCHARGE OF SECONDARY OBLIGATION ARISING AFTER BREACH

429. Methods of discharge of right of action. The right of action arising from a breach of contract can only be discharged in one of three ways:

- (a) By the consent of the parties.
- (b) By the judgment of a court of competent jurisdiction.
- (c) By lapse of time.

430. Release or waiver. This may take place either by release or by accord and satisfaction; and the distinction between these

^a *Walton v. Mascall*, (1844) 13 M. & W. 458. ^b *Dixon v. Clark*, (1848) 5 C.B. 377.

^c The statutes which define legal tender are these: The Bank of England Act, 1833 (3 & 4 Will. IV, c. 98), § 6, enacts that Bank of England notes are legal tender for any sum above £5, except by the Bank itself.

The Coinage Act, 1870 (33 & 34 Vict. c. 10), § 4, enacts that the coinage of the Mint shall be legal tender as follows: gold coins, to any amount; silver coins, up to forty shillings; bronze coins, up to one shilling. And § 11 of the same Act gives power to the Crown to determine by proclamation what coins issued by a branch of the Mint in any British possession shall be legal tender in other parts of the British dominions.

¹ *Becker v. Boon*, (1874) 61 N.Y. 317; *Werner v. Tuch*, (1891) 127 N.Y. 217.

² *Knight v. Abbott*, (1858) 30 Vt. 577; *Waldron v. Murphy*, (1879) 40 Mich. 668; *Noyes v. Wyckoff*, (1889) 114 N.Y. 204.

Legal tender money consists of the following: gold coins; standard silver dollars; United States notes ("greenbacks"); Treasury notes of Act of 1890; subsidiary silver for amounts not exceeding \$10; nickel and bronze coins for amounts not exceeding 25 cents. Gold certificates, silver certificates and national bank-notes are not legal tender for private debts except that one national bank is bound to receive the notes of another national bank.

two modes of discharge brings us back to the elementary rule of contract, that a promise made without consideration must, in order to be binding, be made under seal. A release is a waiver, by the person entitled, of a right of action accruing to him from a breach of a promise made to him.

In order that such a waiver should bind the person making it, it is necessary that it should be made under seal; otherwise it would be nothing more than a promise, given without consideration, to forbear from the exercise of a right.¹

To this rule bills of exchange and promissory notes form an exception. We have already seen that these instruments admit of a parol waiver before they fall due. One who has a right of action arising upon a bill or note can discharge it by an unconditional gratuitous renunciation, in writing, or by the delivery of the bill to the acceptor.²

431. Accord and satisfaction. Accord and satisfaction is an agreement not necessarily under seal, the effect of which is to discharge the right of action possessed by one of the parties to the agreement. In order to have this effect there must not only be consideration for the promise of the party entitled to sue, but the consideration must be executed in his favor. Otherwise the agreement is an *accord* without a *satisfaction*.³ The promisor must have obtained what he bargained for in lieu of his right of action, and must have obtained something more than a new arrangement as to the payment or discharge of the existing liability.⁴

^a 45 & 46 Viet. c. 61, § 62.

^b Bayley v. Homan, (1837) 3 Bing. N.C. at p. 920.

^c McManus v. Bark, (1870) L.R. 5 Ex. 65.

¹ Kidder v. Kidder, (1859) 33 Pa. 268; Collyer v. Moulton, (1868) 9 R.I. 90; Hale v. Spaulding, (1888) 145 Mass. 482. Waiver before breach must be distinguished. See §§ 412, 413, *ante*. It is not difficult to distinguish between a release and a promise. The former terminates the releasor's *right*; the latter creates a *duty* in the promisor. A mere release does not create a duty to forbear to sue. If the releasor should later bring suit he does not thereby become bound to pay damages in the absence of facts constituting malicious prosecution.

² See *ante*, § 414.

³ An "accord" is in general a bilateral contract providing a means by which an existing claim may be discharged; a "satisfaction" is the performance of this contract satisfying or discharging the original claim. Ordinarily the bilateral contract constituting an accord is not in itself a bar to an action upon the original claim, since it is understood that only satisfaction (i.e., performance of the contract of accord) shall extinguish the claim. Kromer v. Heim, (1879) 75 N.Y. 574. Even an unaccepted tender of performance will not extinguish the original claim. Kromer v. Heim, *supra*; Hoeler v. Hursh, (1892) 151 Pa. 415; Hayes v. Allen, (1894) 160 Mass. 286. But it

The *satisfaction* may consist in the acquisition of a new right against the debtor, as the receipt from him of a negotiable instrument in lieu of payment;^{a 1} or of new rights against the debtor and third parties, as in the case of a composition with creditors;^{b 2} or of something different in kind to that which the debtor was bound by the original contract to perform;³ but it must have been taken by the creditor as *satisfaction* for his claim in order to operate as a valid discharge.⁴

432. **Judgment merges right of action.** The judgment of a court of competent jurisdiction in the plaintiff's favor discharges the right of action arising from breach of contract. The right is thereby *merged* in the more solemn form of obligation which we have dealt with elsewhere as one of the so-called contracts of record.⁵

The results of legal proceedings taken upon a broken contract may thus be summarized:

The bringing of an action has not of itself any effect in discharging the secondary right to damages. Another action may be brought for the same cause in another court; and though proceedings in such an action would be stayed, if they were merely vexatious, upon application to the summary jurisdiction of the courts,^c yet if action for the same cause be brought in an English

^a *Goddard v. O'Brien*, (1882) 9 Q.B.D. 40.

^b *Bidder v. Bridges*, (1887) 37 Ch.D. (C.A.) 406.

^c *Judicature Acts*, order 25, r. 4.

may be that the parties have agreed that the contract of accord shall itself be taken as a satisfaction of the original right of action, and in that case there is a discharge by substituted contract. *Morehouse v. Second N.B.* (1885) 98 N.Y. 503; *Nassoiv v. Tomlinson*, (1896) 148 N.Y. 326; *Babcock v. Hawkins*, (1851) 23 Vt. 561; *Simmons v. Clark*, (1870) 56 Ill. 96. The acceptance of a check sent as in full payment of a disputed claim has been held to be an accord and satisfaction, even where the claimant asserts that he is accepting it in part payment only. *Nassoiv v. Tomlinson*, *supra*; *Flynn v. Hurlock*, (1900) 194 Pa. 462. There are cases *contra*.

¹ *Babcock v. Hawkins*, (1851) 23 Vt. 561.

² See *ante*, § 141.

³ *Alden v. Thurber*, (1889) 149 Mass. 271; *McCreery v. Day*, (1890) 119 N.Y. 1.

⁴ It is often said that "upon an *accord* no remedy lies." *Lynn v. Bruce*, (1794) 2 H.Bl. 317; *Allen v. Harris*, (1701) 1 Ld. Raym. 122; 1 C.J. 533. This is quite unsound and is based almost wholly upon mere *dicta*. An "accord executory" is not a satisfaction of the previous claim, because the agreement is that it is *performance* that is to operate as satisfaction. But if the usual elements of a contract are present an accord is enforceable by action. *Crowther v. Farrer*, (1850) 15 Q.B. 677; *Nash v. Armstrong*, (1861) 10 C.B. (N.S.) 259; *Schweider v. Lang*, (1882) 29 Minn. 254.

⁵ *Miller v. Covert*, (1828, N.Y.) 1 Wend. 487. But it must be the same right of action. *Vanuxem v. Burr*, (1890) 151 Mass. 386. Judgment of foreign court does not bar action. See § 76, *ante*. The award of an arbitrator has much the same effect as a judgment. See *ante*, § 251a.

and a foreign court, the fact that the defendant is being sued in the latter would not in any way help or affect his position in the former.¹ But when judgment is given in an action, whether by consent, or by decision of the court, the obligation is discharged by *estoppel*. The plaintiff cannot bring another action for the same cause so long as the judgment stands.² The judgment, if against him, may be reversed on appeal and a judgment entered in his favor, or the parties may be remitted to their original positions by a new trial of the case being ordered.

But such an estoppel can only result from an adverse judgment if it has proceeded upon the merits of the case. If a man fail because he has sued in a wrong character, as executor instead of administrator, or at a wrong time, as where action is brought before a condition of the contract is fulfilled, such as the expiration of a period of credit in the sale of goods, a judgment proceeding on these grounds will not prevent him from succeeding in a subsequent action.³

If the plaintiff get judgment in his favor, the right of action is discharged and a new obligation arises, a form of the so-called contract of record. It remains to say that the obligation arising from judgment may be discharged if the judgment debt is paid, or satisfaction obtained by the creditor from the property of his debtor by the process of execution.⁴

433. *Statute of limitations.* At common law lapse of time does not affect contractual rights. Such rights are of a permanent and indestructible character, unless either from the nature of the contract, or from its terms, it be limited in point of duration.⁵

But though the rights possess this permanent character, the remedies arising from their violation are, by various statutory provisions, withdrawn after a certain lapse of time; *interest rei-*

^a *Ex parte Bank of England*, (1895) 1 Ch. 37.

^b *Palmer v. Temple*, (1830) 9 A. & E. 321.

^c 4 & 5 Anne, c. 16, § 12.

^d *Per Lord Selborne*, *Llanelli Railway Co. v. L. & N.W. Railway Co.*, (1873) L.R. 7 H.L. 567.

¹ Pendency of action in one state does not bar an action in another state or in the Federal courts. *Pierce v. Feagans*, (1889) 39 Fed. 587; *Stanton v. Embrey*, (1876) 93 U.S. 548; *McJilton v. Love*, (1851) 13 Ill. 486.

² As to effect of one judgment upon an installment contract, see *Allen v. Colliery Eng. Co.*, (1900) 196 Pa. 512; *Alie v. Nadeau*, (1899) 93 Me. 282; *Pakas v. Hollingshead*, (1906) 184 N.Y. 211.

³ *Kittredge v. Holt*, (1877) 58 N.H. 191; *Wood v. Faurt*, (1884) 55 Mich. 185.

⁴ See *ante*, § 76.

publicae ut sit finis litium. The remedies are barred, though the rights are not extinguished.¹

It was enacted by 21 Jac. I, c. 16, § 3, that

"All actions of account, and upon the case . . . all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent . . . shall be commenced and sued within . . . six years next after the cause of such action or suit and not after."

"Action upon the case" includes actions of *assumpsit*, as was explained in an earlier chapter: but actions "on accounts" between merchants and merchants, their factors or servants, were expressly excepted from the Act of James,^a and the limitation of six years was only applied to these by the Mercantile Law Amendment Act, 1856, § 9.^b

The statute 3 & 4 Will. IV, c. 42, § 3, limits the bringing of actions upon any contract under seal to a period of twenty years from the cause of action arising.

434. Disabilities suspending operation of statutes. The statutory period of limitation begins to run as soon as the cause of action arises, but there may be circumstances which suspend their operation. The statute of James I provided that infancy, coverture, insanity, imprisonment, or absence beyond seas should, if the plaintiff was under any such disabilities when the cause of action arose, suspend the operation of the statute until

^a 21 Jac. I, c. 16.

^b 19 & 20 Vict. c. 97. Before the Judicature Acts only a few statutes of limitation expressly applied to equitable claims, e.g., the Real Property Limitation Act, 1833 (3 & 4 Will. IV, c. 27); but courts of equity accepted by analogy the limitation period prescribed by other statutes in cases where a legal right was in question. *In re Greaves*, (1881) 18 Ch. D. 554. *Re Robinson* [1911] 1 Ch. 502. Statutes of limitation are now binding on all courts in every case to which they apply; in other cases they are still applied by analogy in courts of equity, unless the remedy sought is altogether dissimilar to the concurrent legal remedy, e.g., the enforcement of a vendor's lien for unpaid purchase-money. *In re Stucley*, [1906] 1 Ch. 67.

¹ The English and American statutes of limitation will be found in Wood, *Limitation of Actions*, Appendix. In Wisconsin it is held that the statute extinguishes the right. *Pierce v. Seymour*, (1881) 52 Wis. 272. But the general holding is that the remedy is barred, and that when the bar is removed, either by act of the debtor or by law, the right revives. *Campbell v. Holt*, (1885) 115 U.S. 620; *Johnson v. Albany &c. R.*, (1873) 54 N.Y. 416. Moreover, the right continues in existence as a basis for the enforcement of liens or other securities. *Clay v. Freeman*, (1886) 118 U.S. 97; *Hulbert v. Clark*, (1891) 128 N.Y. 295, questioning *Borst v. Corey*, (1857) 15 N.Y. 505. *Contra*: *Jackson v. Longwell*, (1901) 63 Kans. 93. A "right" without a remedy would seem to be of little moment. Here it seems to consist chiefly in a power in the debtor to create a new obligation by a mere promise without consideration. This new obligation is generally co-extensive with the former one, but it need not be. See *Gillingham v. Brown*, (1901) 178 Mass. 417.

the removal of the disability.^a The statute of William IV applied the same rule, except in case of imprisonment, to actions on specialties.^b

But now the Mercantile Law Amendment Act of 1856 has taken away the privilege of a plaintiff who is imprisoned or beyond seas in actions on simple contract or specialty.^c

Where it is the defendant who is beyond seas at the time the right of action accrues, the operation of the statute is suspended until he returns.^d But where one of two or more defendants is beyond the jurisdiction, action brought against those who are accessible will not affect the rights of the plaintiff against such as may be beyond seas.^e

The case of *Musurus Bey v. Gadban*^f affords a good illustration of the law. There the defendant counter-claimed for a debt due from the plaintiff as executor of Musurus Pacha, who had incurred the debt to Gadban twenty years before, while he was Turkish ambassador in London. It was held that no right of action could accrue against Musurus Pacha while he was ambassador, nor within a reasonable time during which he remained in England after his recall by reason of his diplomatic privilege; that thenceforward he was beyond seas, until his death in 1890, and that therefore the statute had not begun to take effect at that date, and the counter-claim was sustainable.

A disability arising after the period of limitation has begun to run will not affect the operation of the statute: nor will ignorance that a right of action existed. But where that ignorance is produced by the fraud of the defendant, and no reasonable diligence would have enabled the plaintiff to discover that he had a cause of action, the statutory period commences with the discovery of the fraud.^g This is an equitable rule generalized in its application by § 24, sub-s. 1, of the Judicature Act, 1873.^h

435. Reviving right barred by the statutes. Statutes of limitation may be so framed as not merely to bar the remedy, but wholly to extinguish the right:¹ such is the case as to realty under

^a 21 Jac. I, c. 16, § 7.

^c 19 & 20 Vict. c. 97, § 10.

^e 19 & 20 Vict. c. 97, § 11.

^g *Blair v. Bromley*, (1847) 5 Hare, 559.

^b 3 & 4 Will. IV, c. 42, § 4.

^d 3 & 4 Will. IV, c. 42, § 4; 4 Anne, c. 16, § 19.

^f [1894] 2 Q.B. (C.A.) 352.

^h *Gibbs v. Guild*, (1882) 9 Q.B.D. 66.

¹ For circumstances suspending the operation of the Statute of Limitations, see Wood, *Limitation of Actions*, § 237 *et seq.* For the effect of fraud, see *ibid.* §§ 274-76.

² To "extinguish the right" means not only that the duty of the debtor is ended (he has the legal *privilege* of not paying), but also that he has no power of creating a *new right* in the creditor by a mere promise without consideration.

3 & 4 Will. IV, c. 27. But in contract the remedy which is alone barred by 21 Jac. I, c. 16 may be revived.

Where a specialty contract results in a money debt, the right of action may be revived, (1) by an acknowledgment of the debt in writing, signed by the party liable, or his agent; or (2) by part payment, or part satisfaction on account of any principal or interest due on such a specialty debt. Such a payment if made by the agent of the party liable will have the effect of reviving the claim.^{a 1}

Where a simple contract has resulted in a money debt the right of action may also be revived by subsequent acknowledgment or promise, and this rule is affected by two statutes: Lord Tenterden's Act of 1828,^b which requires that the acknowledgment or promise, to be effectual, must be in writing, and the Mercantile Law Amendment Act of 1856,^c which provides that such a writing may be signed by the agent of the party chargeable, duly authorized thereto, and is then as effective as though signed by the party himself.²

The sort of acknowledgment or promise which is requisite in order to revive a simple contract debt for another period of six years, is thus described by Mellish, L.J.:

"There must be one of three things to take the case out of the statute (of limitation). Either there must be an acknowledgment of the debt from which a promise to pay is implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."^d

This being the principle, its application in every case must turn on the construction of the words of the alleged promisor.^e And "When the question is, what effect is to be given to particular words, little assistance can be derived from the effect given to other words in applying a principle which is admitted."^{f 3}

^a 3 & 4 Will. IV, c. 42, § 5. ^b 9 Geo. IV, c. 14, § 1. ^c 19 & 20 Vict. c. 97, § 13.
^d *In re River Steamer Co.*, (1871) 6 Ch. 828. ^e *Langrish v. Watts*, [1903] 1 K.B. 636.
^f *Cleasby, B.*, in *Skeet v. Lindsay*, (1877) 2 Ex. D. 317.

¹ As to effect of acknowledgment in case of specialties, see Wood, §§ 66, 176.

² Generally in the United States an acknowledgment must be in writing signed by the party to be charged or his authorized agent. Stimson, *Am. St. Law*, § 4147; Wood, *Limitation of Actions*, § 82 *et seq.* But these statutes do not generally prevent the proof of acknowledgment by part payment. *Ibid.* § 96 *et seq.*; though the construction is otherwise in some states. *Perry v. Ellis*, (1885) 62 Miss. 711; *Hale v. Wilson*, (1886) 70 Iowa, 311.

³ An order or bill of exchange drawn by the debtor in favor of the creditor

The debt, however, may be revived otherwise than by express acknowledgment or promise. A part payment, or payment on account of the principal, or a payment of interest upon the debt will take the contract out of the statute. When this is so, Lord Tenterden's Act provides that nothing therein contained "shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person." But the payment must be made with reference to the original debt, and in such a way as to amount to an acknowledgment of it.^a Payment to a third party is insufficient; so that where the maker of a promissory note made a payment on account to the original payee after six years had expired, the note having, in the meantime, been indorsed to a third party, the payment was not an acknowledgment which revived the rights of the indorsee.^{b 1}

436. Bankruptcy. Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the court an order of discharge.² It is sufficient to call attention to this mode of discharge, without entering into a discussion as to the nature and effects of bankruptcy, or the provisions of the Bankruptcy Act of 1914, which consolidates earlier enactments upon the subject.³

When a man becomes bankrupt his property passes to his trustee, who can, as far as rights *ex contractu* are concerned (and we are not concerned with anything else), exercise the rights of the bankrupt, and can do what the bankrupt could not do, since he can repudiate contracts if they appear to be unprofitable.⁴

When the bankrupt obtains an order of discharge he is discharged from all debts provable under the bankruptcy, whether or no they were proved, and even if the creditor was in ignorance

^a *Waters v. Tompkins*, (1835) 2 C.M. & R. 723.

^b *Stamford Banking Co. v. Smith*, [1892] 1 Q.B. (C.A.) 765. ^c 4 & 5 Geo. V. c. 59.

is an acknowledgment of the debt. *Manchester v. Braedner*, (1887) 107 N.Y. 346. But an acknowledgment in an undelivered instrument is insufficient. *Allen v. Collier*, (1879) 70 Mo. 138. See for words held a sufficient acknowledgment, *Schmidt v. Pfau*, (1885) 114 Ill. 494; *Blakeman v. Fonda*, (1874) 41 Conn. 561; *Weston v. Hodgkins*, (1884) 136 Mass. 326; *ante*, § 151.

¹ For effect of part payment, see *Wood*, *Limitation of Actions*, § 96 *et seq.*

² A state bankruptcy discharge has no effect upon debts contracted prior to the passage of the statute. *Sturges v. Crowninshield*, (1819, U.S.) 4 Wheat. 122. Nor upon the claims of foreign creditors unless the creditors become parties to the proceedings. *Gilman v. Lockwood*, (1866, U.S.) 4 Wall. 409; *Guernsey v. Wood*, (1881) 130 Mass. 503. As to what claims are provable see *Reed v. Pierce*, (1853) 36 Me. 455. A national bankruptcy law has been in force since 1898.

³ See § 333, *ante*.

of the bankruptcy proceedings.^a But the bankrupt's discharge may also be granted subject to conditions. The court may require that he shall consent to judgment being entered against him for debts unsatisfied at the date of the discharge: and execution may be issued on such judgment with leave of the court.^b

In no case is the bankrupt discharged from liability incurred by fraud or fraudulent breach of trust exercised by him.^c

^a 4 & 5 Geo. V, c. 59, § 28. *Heather v. Webb*, (1876) 2 C.P.D. 1.
^b § 28 (2). ^c § 28 (1).

PART V

AGENCY

437. **Agency a form of employment.** When dealing with the operation of contract we had to note that although one man cannot by contract with another confer rights or impose liabilities upon a third, yet that one man might represent another, as being employed by him, for the purpose of bringing him into legal relations with a third. Employment for this purpose is called Agency.

The subject of agency is interesting as a matter of legal history, as well as of practical importance, but we can only deal with it in outline here, in its relation to contract.

English law, though it leaned strongly against the assignment of contractual or other rights of action, found no difficulty in permitting the representation of one man by another for purposes of contract or for wrong. And it seems that this liability of one for the act or default of another springs universally from the contract of employment.^a The liability of the master for the negligence of his servant is the undesigned result of such a contract; the liability of the principal for the act of his agent is its designed or contemplated result. But the master is not liable for the act of his servant done outside the scope of his employment, nor the principal for the act of his agent done outside the limits of his authority.

To discuss the law of master and servant from this point of view is out of place here, otherwise it might be interesting to inquire how far the doctrine of representation in such cases is of modern origin. It may be that the form which the employer's liability has assumed in English law is an application to modern society of rules properly applicable to the relation of master and slave, where the master is liable for injury caused by that which is a part of his property.

But agency for the purpose of creating contractual relations retains no trace in English law of its origin in status. Even where a man employs as his agent one who is incapable of enter-

^a Writers on Agency seem loth to recognise that agency is a form of employment. Yet in dealing with the principal's liability for the agent's wrong, they always introduce large selections from the law of master and servant.

ing into a contract with himself, as where he gives power to his child, being an infant, the power must be given, it is never inherent. There must be evidence of intention on the one side to confer, on the other to receive and exercise,¹ the power given, though the person employed may, from defective status, be unable to sue or be sued on the contract of employment.

From this rule we must, however, except that form of agency known as "agency of necessity," a quasi-contractual relation formed by the operation of rules of law upon the circumstances of the parties, and not by the agreement of the parties themselves.²

438. Outline of subject. The rules which constitute the law of principal and agent fall into three chapters.

1. The mode in which agency relations are formed.³

2. The resulting legal relations thus created;⁴ and here we have to consider —

(a) The contract of employment as between principal and agent.

(b) The relations of the parties where the agent contracts for a principal whom he names.

¹ A power can be conferred without any act whatever on the part of the recipient. Thus, an offer made by *A* to *B* creates in *B* the power of creating contractual relations by accepting. *B* gains this power without either acting or intending. The same is true of principal and agent. The principal can create a power in an agent without any assent by the latter; but of course he can create in the agent no *duty* of exercising the power (or any other duty) without some action by the agent.

² The proper method of approach in this topic, as in the general subject of contracts, is to separate operative facts from the legal relations that result therefrom. The life history of an agency may be briefly indicated as follows: (1) Operative facts, including some action by the principal. (2) Resulting legal relations between principal and agent, necessarily including a power in the agent. (3) Subsequent operative facts, which consist of or include acts by the agent whereby he exercises his power. (4) Resulting legal relations between principal and agent, principal and third persons, agent and third persons. (5) New operative facts extinguishing the agent's power.

The operative facts under (1) may include offer and acceptance (although not necessarily), and in that case the resulting legal relations (2) will include a contract between principal and agent, i.e., will include rights and duties as well as the agent's powers and privileges. It is the purpose of a law treatise to determine what facts are operative, as distinguished from the merely evidential or the wholly immaterial, and what are the legal relations that they operate to produce.

³ The operative facts which create in the agent the power to bring his principal into new legal relations.

⁴ The legal relations consequent upon the foregoing operative facts, and the legal relations consequent upon subsequent operative acts of the agent.

(c) The relations of the parties where the agent contracts as agent, but without disclosing the principal's name: or in his own name, without disclosing his principal's existence.

3. The mode in which agency relations are brought to an end.¹

¹ New operative facts terminating the power of the agent and the other legal relations between the agent and his principal.

CHAPTER XVII

The Mode in which Agency is created

439. Capacity of parties. Full contractual capacity is not necessary to enable a person to represent another so as to bring him into legal relations with a third. An infant can be an agent, although he could not incur liability under the contract of employment.¹ But no one can appoint an agent who is not otherwise capable of entering into contracts.²

440. How the relation may arise. Employment for the purpose of agency is brought about like any other contract by offer and acceptance. And we should bear in mind that "agency" is not coextensive with "employment," though it is, unfortunately, not uncommon to speak of a person employed for any-purpose as the agent of the employer. By agency is meant employment *for the purpose of bringing the employer into legal relations with a third party.*

(a) Offer and acceptance for this purpose may take the form of an offer of a promise for an act. Such are all cases of requests for services, which, even if gratuitously rendered, entitle the person employed to an indemnity for loss, risk, or expense, and the employer to the exercise of reasonable diligence on the part of the employed.

We should bear in mind in dealing with contracts of this nature, which only come into existence upon the rendering of the service requested, that reward may be offered when the request is made, or may be implied from the nature of the service requested, and that there may be cases of gratuitous employment, where the employed only becomes liable, if, after entering on the service, he performs it improperly.³

(b) Or secondly, the relation may be created by the accept-

¹ Talbot v. Bowen, (1818, Ky.) 1 A.K. Marsh. 436; Chastain v. Zach, (1833, S.Car.) 1 Hill, 270 (slave); Lyon v. Kent, (1871) 45 Ala. 656.

² A married woman's appointment of an agent is void at common law. Fleah v. Lindsay, (1893) 115 Mo. 1. There is authority for saying that the appointment of an agent by an infant is void. See *ante*, § 156, note 4. But the modern tendency is to treat it as voidable merely. Coursolle v. Weyerhauser, (1897) 69 Minn. 328.

³ *Ante*, § 134.

ance of an executed consideration. Such is the case where *A* ratifies a contract which *X*, without any antecedent authority, has made on his behalf. *A* accepts the bargain and thereby takes over its liabilities from *X*.

(c) Or thirdly, the relation may be created by mutual promises, to employ and remunerate on one side, and to do the work required on the other.

441. Forms of appointment. Operative acts by the principal. We will now speak no longer of employer and employed, but of principal and agent. The authority given by the principal to the agent, enabling the latter to bind the former by acts done within the scope of that authority, may be given by writing, words, or conduct.¹

In one case only is it necessary that the authority should take a special form. In order that an agent may make a binding contract under seal it is necessary that he should receive authority under seal. Such a formal authority is called a *power of attorney*.²

There is nothing to be said as to the formation of the contract by writing or words which has not been said in the chapter on offer and acceptance. As regards its formation by conduct the inference of intention may be affected by the relation in which the parties stand to one another.

¹ The term "authority," like the term "contract," may easily be used in three senses, and is therefore a term to be avoided when accurate reasoning is desirable. It may be used to mean (1) the operative acts of the principal, (2) a physical document executed by the principal, or (3) the legal relations consequent upon the preceding operative facts (1) and (2), and especially the legal *power* conferred upon the agent to bring the principal into new legal relations without any further action by the principal. The operative facts may be spoken words, a document together with the acts necessary to execute it, or other conduct by the principal apparently expressing an intention to create a power. Hereafter, the word "authority" will be used to denote these operative facts; in other cases the word *power* will usually be substituted. This latter word is not so likely to be taken in shifting senses, in spite of the fact that "power of attorney" generally means a physical document under seal.

² There are some exceptions to this rule. (1) If the instrument be executed in the presence of the principal, a parol authority is sufficient. *Gardner v. Gardner*, (1850, Mass.) 5 Cush. 483; *Eggleston v. Wagner*, (1881) 46 Mich. 610. (2) So also if the seal is superfluous and may be disregarded. *Worrall v. Munn*, (1851) 5 N.Y. 229; *Wagoner v. Watts*, (1882) 44 N.J. L. 126. (3) A corporate agent may be appointed by vote of the directors to execute a sealed instrument. *Burrill v. Nahant Bank*, (1840, Mass.) 2 Met. 163; *Howe v. Keeler*, (1858) 27 Conn. 538; (4) or a partner by parol authority of the partnership. *Smith v. Kerr*, (1849) 3 N.Y. 144. Observe that by "parol authority" is here meant an *act* of oral communication or a physical document (unsealed).

442. Agency inferred from special relations. The relation of master and servant, of husband and wife, is sometimes thought to be an inherent authority to the servant or the wife. But it is not so; the power as agent can only spring from the words or conduct of the master or husband.

If a master allows his servant to purchase goods for him of *X* habitually, upon credit, *X* becomes entitled to look to the master for payment for such things as are supplied in the ordinary course of dealing.^a

So too with husband and wife. Cohabitation does not necessarily imply agency; but where husband and wife are living together, the wife is presumed, until the contrary is shown, to have power from her husband to purchase goods for the use of the household.^b This presumption may always be rebutted by evidence showing that such power has not in fact been given; as when, for example, the husband can show that he has expressly forbidden his wife to pledge his credit or already makes her an adequate allowance for household purposes.^c If, however, the husband has recognized, and taken on himself the liability in respect of, his wife's past dealings with the tradesman, he has by his own acts held her out as his agent, and he will therefore be bound by such contracts as she may make, unless and until he brings to the actual knowledge of the tradesman the fact that her agency is determined.^{d 1}

We may contrast this relation with that of partnership. Marriage does not of itself create the relation of agent and principal: partnership does. The contract of partnership confers on each partner a power to act for the others in the ordinary course of the partnership business.^e And each partner accepts a corresponding liability for the act of his fellows.^f

443. Agency inferred from conduct: estoppel. The relations above described, employment and marriage, enable an authority

^a (1891) 1 Shower, 95.

^b *Morel Bros. v. Lord Westmoreland*, [1904] A.C. 11.

^c *Remington v. Broadwood*, (1902) 18 T.L.R. 270.

^d *Debenham v. Mellon*, (1880) 5 Q.B.D. 403.

^e 53 & 54 Vict. c. 39, § 5.

^f *Hawken v. Bourne*, (1841) 8 M. & W. 710.

¹ The power may be intentionally created by the husband [*Gates v. Brower*, (1858) 9 N.Y. 205]; or by conduct on his part that leads another reasonably to believe that he had such an intention [*Bergh v. Warner*, (1891) 47 Minn. 250]; or there may be an "agency of necessity," i.e., the power may exist in the wife by pure construction of law in order to protect deserted wives and children [*Benjamin v. Dockham*, (1883) 134 Mass. 418]. See *Wanamaker v. Weaver*, (1903) 176 N.Y. 75; 98 Am. St. Rep. 627, note. See the succeeding section.

subject to the rules laid down elsewhere in this book; and in such a case it is immaterial that the person contracting intends to contract on behalf of some third person, if he "at the same time keeps his intention locked up in his own breast."^{a 1}

(b) *The agent must act for a principal who is in contemplation.* He must not make a contract, as agent, with a vague expectation that parties of whom he is not cognizant at the time will relieve him of his liabilities. The act must be "done for another by a person not assuming to act for himself but for such other person."^{b 2}

Apparent, though not real, exceptions to this rule should be noted. A broker may make contracts, as agent, expecting that customers with whom he is in the habit of dealing will take them off his hands. Thus, in contracts of marine insurance made by an insurance-broker, persons "who are not named or ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance. *But then they must be persons who were contemplated at the time the policy was made.*"^{c 3}

So, too, where work is done on behalf of the estate of a deceased person, if it is done by order of one who afterwards becomes administrator and ratifies the contract for the work so done, such a ratification creates a binding promise to pay for the work. Here the principal contemplated is really the estate of the deceased person; this is in existence, although there may be no one capable of acting on its behalf until letters of administration have been obtained.^{d 4}

The converse of these cases is seen in *Tiedemann v. Ledermann*,^e where an agent, without authority and fraudulently, entered into a contract for the sale of wheat in his principal's name,

^a *Keighley, Martin & Co. v. Durant*, [1901] A.C. 240.

^b *Wilson v. Tuman*, (1843) 6 M. & G. 242.

^c *Watson v. Swann*, (1862) 11 C.B. (N.S.) 769. 6 Edw. VII, c. 41, § 86.

^d *In re Watson*, (1886) 18 Q.B.D. 116.

^e [1899] 2 Q.B. 63.

¹ *Hamlin v. Sears*, (1880) 82 N.Y. 327; *Grund v. Van Vleck*, (1873) 69 Ill. 478; *Western Pub. House v. Dist. Tp. of Rock*, (1891) 84 Iowa, 101. *Contra*: *Hayward v. Langmaid*, (1902) 181 Mass. 426.

² *Western Pub. House v. Dist. Tp. of Rock*, *supra*.

³ See *Brainerd v. Dunning*, (1864) 30 N.Y. 211.

⁴ It is probable that the ratification in this case should be a legally inoperative act and that the plaintiff's claim should be regarded as quasi-contractual and as existing even prior to the act of the administrator. The plaintiff is a *negotiorum gestor*. Even if the expression of approval by the administrator should be held to be necessary, there is no necessity of invoking the doctrine of ratification in agency. It would be merely another case where a duty is created by reason of a past consideration and a subsequent consent. In any event, the estate cannot properly be regarded as a principal.

but intending to avail himself of it, for his own ends. The principal could nevertheless ratify and adopt the contract and hold the buyers to their bargain.

(c) *The principal must be in existence.* This rule is important in its bearing on the liabilities of companies for contracts made by the promoters on their behalf before they are formed. In *Kelner v. Baxter*^a the promoters of a company as yet unformed entered into a contract on its behalf, and the company when duly incorporated ratified the contract. It became bankrupt, and the defendant who had contracted as its agent was sued upon the contract. It was argued that the liability had passed, by ratification, to the company and no longer attached to the defendant, but the court held that this could not be.

"Could the 'company,'" said Willes, J., "become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done, — by a person in existence either actually or in contemplation of law, as in the case of the assignee of bankrupts, or administrators whose title for the protection of the estate vests by relation."¹

The rule was cited with approval and adopted by the Privy Council in the later case of the *Natal Land Co. v. Pauline Colliery Syndicate*.^{b 2}

(d) *The agent must contract for such things as the principal can, and lawfully may do.* A man may adopt the wrongful act of another so as to make himself civilly responsible: but if an agent enter into a contract on behalf of a principal who is incapable of making it, or if he enter into an illegal contract, no ratification is possible. The transaction is void, in the one case from the incapacity of the principal, in the other from the illegality of the act.^{c 3}

^a (1866) L.R. 2 C.P. 174.

^b [1904] A.C. 126.

^c *Bird v. Brown*, (1850) 4 Ex. 790; *Mann v. Edinburgh Northern Tramways Co.*, [1903] A.C. 79.

¹ If a ratification in these cases can be made effective by the aid of the threadbare fiction that a title may "vest by relation," there seems to be no strong reason why a ratification by the new corporation should not be held effective by supposing its rights, duties, and powers to vest by relation. In no case is Father Time actually turned back in his course, and in either case the courts may make the subsequent act of ratification a legally operative fact if they choose.

² *Abbott v. Hapgood*, (1889) 150 Mass. 248; *McArthur v. Times Printing Co.*, (1892) 48 Minn. 319; *Bell's Gap R.R. v. Christy*, (1875) 79 Pa. 54; *Rockford &c. R. v. Sage*, (1872) 65 Ill. 328. Cf. *Whitney v. Wyman*, (1879) 101 U.S. 392; *Oakes v. Cattaraugus Water Co.*, (1894) 143 N.Y. 430; *Low v. Conn. &c. R.*, (1864) 45 N.H. 370, (1865) 46 N.H. 284.

³ *Milford v. Water Co.*, (1889) 124 Pa. 610; *Armitage v. Widoe*, (1877) 36 Mich. 124.

On this last ground it has been held that a forged signature cannot be ratified, so as to constitute a defense to criminal proceedings.^a ¹ But is ratification here in question? For one who forges the signature of another is not an agent, actually or in contemplation. The forger does not act for another, he personates the man whose signature he forges.

(e) The principal can only ratify the act of the agent, if at the time when he purports to ratify he could himself do the act in question and produce the intended legal relations.

Thus a contract of insurance made by an agent without his principal's authority cannot be ratified by the principal after he has become aware that the event insured against has in fact occurred. The principal could not himself insure in such circumstances and he is not permitted to take advantage of the agent's unauthorized act.

It is nevertheless to be noted that contracts of marine insurance form a singular exception to this rule; but the courts have clearly stated that the exception is an anomalous one and is not to be extended.^b

Principal may ratify by words or conduct. The principal who accepts the contract made on his behalf by one whom he thereby undertakes to regard as his agent may, as in the acceptance of any other simple contract, signify his assent by words or by conduct. He may avow his responsibility for the act of his agent, or he may take the benefit of it, or otherwise by acquiescence in what is done create a presumption of authority given. Where conduct is relied upon as constituting ratification the relations of the parties and their ordinary course of dealing may create a greater or less presumption that the principal is liable.²

^a *Brook v. Hook*, (1871) L.R. 6 Ex. 89; *McKenzie v. British Linen Co.*, (1881) 6 A.C., 99.
^b *Grover v. Matthews*, [1910] 2 K.B. 401.

¹ *Accord*: *Henry v. Heeb*, (1887) 114 Ind. 275; *Workman v. Wright*, (1878) 33 Ohio St. 405; *Shialer v. Vandike*, (1880) 92 Pa. 447. *Contra*: *Greenfield Bank v. Crafts*, (1862, Mass.) 4 Allen, 447; *Hefner v. Vandolah*, (1872) 62 Ill. 483; *Howard v. Duncan*, (1870, N.Y.) 3 Lans. 174.

² *Strasser v. Conklin*, (1882) 54 Wis. 102; *Wheeler & Wilson Mfg. Co. v. Aughey*, (1891) 144 Pa. 398; *Hyatt v. Clark*, (1890) 118 N.Y. 563. Under what circumstances silence may be evidence of ratification, see *Philadelphia &c. Co. v. Cowell*, (1857) 28 Pa. 329; *Whitley v. James*, (1904) 121 Ga. 521; *Bryce v. Clark*, (1892) 16 N.Y. Supp. 854. The conduct of the principal may be such as to justify, in a greater or less degree, the inference of fact that he intended to ratify. If this inference is once drawn, his conduct then operates not to create a "presumption of authority" but to create the legal relations that would previously have existed if the agent had had the power that he represented himself as having.

CHAPTER XVIII

Legal Relations Existing among Principal, Agent, and Third Persons

446. Outline of subject. The effects of an agency when created as described above may be thus arranged.

1. The legal relations¹ of principal and agent *inter se*.
2. The legal relations of the parties where an agent contracts as agent for a named principal.
3. The legal relations of the parties where an agent contracts for a principal whose name, or whose existence, he does not disclose.

I. THE RIGHTS AND DUTIES OF PRINCIPAL AND AGENT, *inter se*

447. Reciprocal duties. The relations of principal and agent *inter se* are made up of the ordinary relations of employer and employed, and of those which spring from the special business of an agent to bring two parties together for the purpose of making a contract — to establish contractual relations between his employer and third parties.

The principal must pay the agent such commission or reward for the employment as may be agreed upon between them. He must also indemnify the agent for acts lawfully done and liabilities incurred in the execution of his power.²

¹ An agent may be appointed without making a contract with him. In such case the existing legal relations are as follows: a legal *power* in the agent and a correlative *liability* in the principal (a liability to the creation of new legal relations without any further act of his own); a legal *privilege* in the agent of exercising his power and a corresponding *no-right* in the principal; a legal *power* and a legal *privilege* in the principal to revoke the agent's power and privilege, with the correlative *liability* and *no-right* in the agent. New legal relations may be created by subsequent acts of either principal or agent.

If the appointment consists of acts of offer and acceptance creating contractual relations, there will be in addition to the above relations mutual *rights* and *duties* e.g., the principal's *right* to service and the agent's correlative *duty* to serve, the agent's *right* to salary and the principal's correlative *duty* to pay. This means that the usual contractual relations will exist, to be determined by law from the terms of the individual agreement.

² *Bibb v. Allen*, (1893) 149 U.S. 481; *D'Arcy v. Lyle*, (1813, Pa.) 5 Binney, 441; *Saveland v. Green*, (1875) 36 Wis. 612.

The agent is bound, like every person who enters into a contract of employment, to account for such property of his employer as comes into his hands in the course of the employment; to use ordinary diligence in the discharge of his duties; to display any special skill or capacity which he may profess for the work in hand.^{a 1}

There are besides these ordinary relations of employer and employed certain duties, owing by the agent to the principal, which arise from the confidential character of the relations created by contractual agency.

448. Agent may not make secret profit. The agent must make no profit out of transactions into which he may enter on behalf of his principal in the course of the employment beyond the commission agreed upon between them.²

Where an agent is promised a reward or payment which might induce him to act disloyally to his employer, or might diminish his interest in the affairs of his employer, he cannot recover the money promised to him. If he obtains money by a transaction of this nature, he is bound to account for it to his principal, or pay it over to him. If he does not do so the money can be recovered by the principal as a debt due to him.

An engineer in the employ of a railway company was promised by the defendant company a commission the consideration for which was, partly the superintendence of their work, partly the use of his influence with the railway company to obtain an acceptance by them of a tender made by his new employers. He did not appear in fact to have advised his first employers to their prejudice, but it was held that he could not recover in an action brought for this commission. "It needs no authority to show that, even though the employers are not actually injured and the bribe fails to have the intended effect, a contract such as this is a corrupt one and cannot be enforced."^{b 3}

^a *Jenkins v. Betham*, (1855) 15 C.B. 168.

^b *Harrington v. Victoria Graving Dock Co.*, (1878) 3 Q.B.D. 549.

¹ *Page v. Wells*, (1877) 37 Mich. 415; *Butts v. Phelps*, (1883) 79 Mo. 302; *Whitney v. Merchants' Union Exp. Co.*, (1870) 104 Mass. 152; *Heinemann v. Heard*, (1872) 50 N.Y. 27; *Baldwin Bros. v. Potter*, (1874) 46 Vt. 402.

² *Geisinger v. Beyl*, (1891) 80 Wis. 443; *Conkey v. Bond*, (1867) 36 N.Y. 427; *Bunker v. Miles*, (1849) 30 Me. 431; *Holmes v. Cathcart*, (1903) 83 Minn. 213; *Noyes v. Landon*, (1887) 59 Vt. 569; *Salsbury v. Warr*, (1900) 183 Ill. 505.

³ *Woodstock Iron Co. v. Richmond Extension Co.*, (1889) 129 U.S. 643; *Bollman v. Loomis*, (1874) 41 Conn. 581.

In *Andrews v. Ramsay* ^a the plaintiff, a builder, engaged the defendant, an auctioneer, to sell some property on the terms that he should receive £50 commission. Ramsay sold the property and received £20 commission from the purchaser. It was held that he was not only bound to pay over this £20 to his employer, but that he was not entitled to the £50 commission promised, and that though this sum had already been paid it could be recovered. It would be easy to multiply illustrations of this principle.

But the agent is his principal's debtor, not his trustee for money so received. If the money is invested in land or securities these cannot be claimed by the principal, any more than he can claim profits made out of the sums thus received. They constitute a debt due to him, and this he can recover. ^b

It is open to the principal who discovers that his agent has been paid or promised, by the other party, a reward for bringing about the contract, to repudiate the transaction. Nor is it material to inquire what was the effect of the payment or promise on the mind of the agent. "No man should be allowed to have an interest against his duty." ^{c 1}

The Prevention of Corruption Act, 1906, ^d now makes corrupt transactions of all kinds by or with agents criminal offenses also and punishable by fine and imprisonment.

449. Agent may not become principal as against his employer. The agent may not depart from his character as agent and become a principal party to the transaction even though this change of attitude do not result in injury to his employer. If a man is employed to buy or sell on behalf of another he may not sell to his employer or buy of him. ^{e 2}

Nor if he is employed to bring his principal into contractual relations with others may he assume the position of the other contracting party. ³

^a [1903] 2 K.B. 635.

^b *Lister & Co. v. Stubbs*, (1890) 45 Ch. D. 15.

^c *Shipway v. Broadwood*, [1899] 1 Q.B. 373.

^d 6 Edw. VII, c. 34.

^e See Story on Agency, §§ 210, 211.

¹ *Hegenmeyer v. Marks*, (1887) 37 Minn. 6; *Miller v. R. Co.*, (1887) 83 Ala. 274; *City of Findlay v. Pertz*, (1895) 66 Fed. 427; *Alger v. Anderson*, (1897) 78 Fed. 729.

² *Conkey v. Bond*, (1867) 36 N.Y. 427; *Taussig v. Hart*, (1874) 58 N.Y. 425; *Davis v. Hamlin*, (1883) 108 Ill. 39; *People v. Board*, (1863) 11 Mich. 222.

³ *Raisin v. Clark*, (1874) 41 Md. 158; *Walker v. Osgood*, (1867) 98 Mass. 348; *Young v. Trainor*, (1895) 158 Ill. 428; *Mayo v. Knowlton*, (1892) 134 N.Y. 250; *Cannell v. Smith*, (1891) 142 Pa. 25. Cf. *Orton v. Scofield*, (1884) 61 Wis. 382; *Rupp v. Sampson*, (1860, Mass.) 16 Gray, 398.

In illustrating these propositions we may usefully distinguish employment to buy upon commission, from employment to represent a buyer or seller: the one is commission agency, which is not agency in the strict sense of the word, the other is genuine agency.

(a) *Sale*. *A* may agree with *X* to purchase goods of *X* at a price fixed upon. This is a simple contract of sale, and each party makes the best bargain for himself that he can.¹

(b) *Commission agency*. Or *A* may agree with *X* that *X* shall endeavor to procure certain goods and when procured sell them to *A*, receiving not only the price at which the goods were purchased but a commission or reward for his exertions in procuring them.

Here we have a contract of sale with a contract of employment added to it, such as is usually entered into by a commission agent or merchant,² who supplies goods to a foreign correspondent. In such a case the seller procures and sells the goods not at the highest but at the lowest price at which they are obtainable: what he gains by the transaction is not a profit on the price of the goods but a payment by way of commission, which binds him to supply them according to the terms of the order or as cheaply as he can.³

If a seller of goods warrants them to be of a certain quality he is liable to the buyer, on the non-fulfillment of the warranty, for the difference in value between the goods promised and those actually supplied. If a commission agent promises to procure goods of a certain quality and fails to do so, the measure of damages is the loss which his employer has actually sustained, not the profit which he might have made. A seller of goods with a warranty promises that they shall possess a certain quality. A commission agent only undertakes to do his best to obtain goods of such a quality for his employer.⁴

And here the person employed has no power to pledge his employer's credit to other parties, but undertakes simply to obtain and supply the goods ordered on the best terms. Yet it would seem that he might not, without his employer's assent, supply the goods himself, even though they were the best ob-

¹ *Ireland v. Livingston*, (1872) L.R. 5 H.L. 407.

² *Camaboglou v. Gibbs*, (1883) 11 Q.B.D. 797.

³ See *National Cordage Co. v. Sims*, (1895) 44 Neb. 148; *Willcox & Co. v. Ewing*, (1891) 141 U.S. 627.

⁴ "Commission merchant" and "factor" are synonymous terms in American usage. *Perkins v. State*, (1873) 50 Ala. 154.

tainable and supplied at the lowest market price. This is an implied term in his contract of employment.^{a 1}

(c) *Brokerage*. Or thirdly, *A* may agree with *X* that in consideration of a commission paid to *X* he shall make a bargain for *A* with some third party. *X* is then an agent in the true sense of the word, a medium of communication to establish contractual relations between two parties.²

Under these circumstances it is imperative upon *X* that he should not divest himself of his character of agent and become a principal party to the transaction. This may be said to arise from the fiduciary relation of agent and principal: the agent is bound to do the best he can for his principal; if he put himself in a position in which he has an interest in direct antagonism to this duty, it is difficult to suppose that the special knowledge, on the strength of which he was employed, is not exercised to the disadvantage of his employer. Thus if a solicitor employed to effect a sale of property purchase it, nominally for another, but really for himself, the purchase cannot be enforced.^{b 3}

Not merely does the agent under such circumstances create for himself an interest antagonistic to his duty: he fails to do that which he is employed to do, namely, to establish a contractual relation between his employer and some other party. The employer may sustain no loss, but he has not got what he bargained for.

Robinson gave an order to Mollett, a broker in the tallow trade, for the purchase of a quantity of tallow. In accordance with a custom of the market unknown to Robinson, the broker did not establish a contract between his client and a seller, but simply appropriated to him an amount of tallow, corresponding to the order, which he had purchased from a selling broker.

^a *Rothschild v. Brookman*, (1831) 2 Dow & Cl. 188.

^b *McPherson v. Watt*, (1877) 3 App. Cas. 254.

¹ *Taussig v. Hart*, (1874) 58 N.Y. 425. That is, such power and privilege are denied to him by the law for reasons of policy.

² He has a *legal power* to make and to accept offers on behalf of his principal, thus bringing the latter into contractual relations with third persons.

³ *Eldridge v. Walker*, (1871) 60 Ill. 230; *Hughes v. Washington*, (1874) 72 Ill. 84. Where a broker has been employed to sell stocks or other property for his principal, it is his duty not to become the purchaser himself secretly. If he does thus take the property himself, the principal can recover damages if he repudiates the transaction within a reasonable time after discovering the fraud. *Hall v. Paine*, (1916, Mass.) 112 N.E. 153. If the broker refuses to return the goods so taken when they are demanded he is guilty of a conversion. *Stiebel v. Lissberger*, (1915) 151 N.Y. Supp. 822.

It was held that Robinson could not be required to accept goods on these terms, and that he was not bound by a custom of which he was not aware and which altered the "intrinsic character" of the contract.^{a 1}

In *Johnson v. Kearley*^b the law on this subject was thus stated by Fletcher Moulton, L.J.:

"To add on to the price of the article bought an arbitrary sum is a taking of profit and not a commission and is compatible only with a sale and resale. It is absolutely inconsistent with the duty of an agent for purchase, inasmuch as it is the essential idea of a purchase through a broker or any other agent of the kind that the whole benefit of the purchase should go to the principal and that the sole interest of the agent should be in the commission allowed him by his principal. The office of a broker is to make privy of contract between two principals and this is utterly incompatible with making a contract at one price with the one and a corresponding contract at another price with the other."

450. Agent cannot delegate power; sub-agents. The agent may not, as a rule, depute another person to do that which he has undertaken to do.²

The reason of this rule, and its limitations, are thus stated by Thesiger, L.J., in *De Bussche v. Alt*:^c

"As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfill; and that inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident to the contract."

The Lord Justice points out that there are occasions when the existence of such a power must needs be implied, occasions springing from the conduct of the parties, the usage of a trade, the nature of a business or an unforeseen emergency,

^a *Robinson v. Mollett*, (1875) L.R. 7 H.L. 802.

^b [1908] 2 K.B. 514, 528.

^c (1878) 8 Ch. D. 310.

¹ *Tausig v. Hart*, (1874) 58 N.Y. 425; *Terry v. Birmingham Bank*, (1892) 99 Ala. 566; *Skiff v. Stoddard*, (1893) 63 Conn. 198; *Butcher v. Krauth*, (1879 Ky.) 14 Bush. 713; *Armstrong v. Jackson*, (1917) 86 L.J. K.B. 375.

² This means that generally an agent has no legal power to create in a new agent the power to bring the principal into contractual relations with third persons, or to create any other agency relations between the principal and a new agent.

"and that when such implied authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts on him, as if he had been appointed agent by the principal himself."

The establishment of the fiduciary relation between principal and sub-agent follows where such a sub-agency exists, as is shown in *Powell & Thomas v. Evan Jones & Co.*^a

The rule is really an illustration of the more general rule that liabilities under a contract may not be assigned without the consent of the promisee.²

But where there is no such implied power and the agent employs a sub-agent for his own convenience, no contract arises between the principal and the sub-agent. On default of the agent the principal cannot intervene as an undisclosed principal to the contract between agent and sub-agent.^b Nor can he treat the sub-agent as one employed by him, and follow and reclaim property which has passed into the sub-agent's hands.³

II. LEGAL RELATIONS OF THE PARTIES WHERE AN AGENT CONTRACTS FOR A NAMED PRINCIPAL

451. Contract for named principal. Where an agent contracts, as agent, for a named principal, so that the other party to the contract looks through the agent to a principal whose name is disclosed, it may be laid down, as a general rule, that the agent drops out of the transaction so soon as the contract is made.

Where the transaction takes this form only two matters arise for discussion: the nature and extent of the agent's power; and the rights of the parties where an agent enters into contracts, either without authority, or in excess of an authority given to him.

452. General and special agents. An idle distinction has been drawn between general and special agents, as though they pos-

^a [1905] 1 K.B. 11.

^b *New Zealand Co. v. Watson*, (1881) 7 Q.B.D. (C.A.) 374.

¹ Sub-agency may be impliedly authorized by the nature of the appointment of the agent or by usage. *Harralson v. Stein*, (1875) 50 Ala. 347; *Arff v. Ins. Co.*, (1890) 125 N.Y. 57; *Carpenter v. Ins. Co.*, (1892) 135 N.Y. 298; *Grady v. Ins. Co.*, (1875) 60 Mo. 116; *Newell v. Smith*, (1877) 49 Vt. 255.

² See the notes to §§ 275, 302, 303, *ante*.

³ *Exchange Nat. Bk. v. Third Nat. Bk.*, (1884) 112 U.S. 276; *Simpson v. Waldby*, (1886) 63 Mich. 439; *Power v. First Nat. Bk.*, (1887) 6 Mont. 251. See *Huffcut, Agency*, §§ 93-95.

essed two sorts of power different in kind from one another. There is no such difference.

If John Styles, having power to act on behalf of Richard Roe and describing himself as agent for Richard Roe, makes a contract on Roe's behalf with John Doe, he brings Roe and Doe into the relation of two contracting parties, and himself drops out. The power may have been wide or narrow, general or special, but the difference is only one of degree.¹

For instance, *X* sends *A* to offer £100 for *M*'s horse Robin Hood, or to buy the horse for a price not exceeding £100, or for as low a price as he can, or to buy the best horse in *M*'s stable at the lowest price; or *X* sends *A* to London to get the best horse he can at the lowest price; or *X* agrees with *A* that *A* shall keep him supplied with horses of a certain sort and provide for their keep: all these cases differ from one another in nothing but the extent of the power given, there is no difference in kind between any one of the cases and any other: in none of them does *A* incur any personal liability to *M* or any one with whom he contracts on behalf of *X* so long as he acts as agent, names his principal, and keeps within the limits set by *X*.

453. When secret instructions will not limit agent's power. It should be observed — indeed it follows from what has been said — that *X* cannot by private communications with *A* limit the power which he has allowed *A* to assume.²

"There are two cases in which a principal becomes liable for the acts of his agent: one where the agent acts within the limits of his authority, the other where he transgresses the actual limits, but acts within the apparent limits, where those apparent limits have been sanctioned by the principal."³

Jones employed Bushell as manager of his business, and it was incidental to the business that bills should be drawn and accepted from time to time by the manager. Jones, however, for-

¹ *Maddick v. Marshall*, (1864) 16 C.B. (N.S.) 303.

² *Hatch v. Taylor*, (1840) 10 N.H. 538; *Butler v. Maples*, (1869, U.S.) 9 Wall. 766.

³ An agent has no greater power than the principal intends him to have, unless the principal has himself so acted as to induce the third party reasonably to believe that the agent has the further power he claims to have. In the absence of any such conduct on the part of the principal, the agent will never have any greater power than the instructions of the principal create; in such case it makes no difference whether the instructions are secret or not secret. The power of an agent is always as great as the third party believes it to be, provided his belief is *reasonable* and the principal's own conduct was the legal cause of such belief. In cases of this latter sort secret instructions are ineffective. These cases have been described, not altogether happily perhaps, as *agency by estoppel*. See *ante*, § 443.

bade Bushell to draw and accept bills. Bushell accepted some bills, Jones was sued upon them and was held liable. "If a man employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority." ^{a 1}

454. Auctioneers. We may note the power with which certain kinds of agents are invested in the ordinary course of their employment.

An auctioneer is an agent to sell goods at a public auction. He is primarily an agent for the seller, but, upon the goods being knocked down, he becomes also the agent of the buyer; he is so for the purpose of recording the bidding "*at the time and as part of the transaction,*" so as to provide a memorandum within the meaning of the 4th section of the Statute of Frauds and of the Sale of Goods Act.^{b 2} He has not merely a power to sell, but actual possession of the goods, and a lien upon them for his charges. He may sue the purchaser in his own name, and even where he contracts avowedly as agent, and for a known principal, he may introduce such terms into the contract made with the buyer as to render himself personally liable.^{c 3}

But the principal will be bound if the auctioneer acts in accordance with what justly appears to be the principal's intention, though he disobey instructions privately given. An auctioneer through inadvertence and contrary to instructions put up an article for sale without reserve. His principal was bound by the terms of sale.^{d 4}

455. Factors. A factor by the rules of common law and of mercantile usage is an agent to whom goods are consigned for the purpose of sale, and he has possession of the goods, power to sell them in his own name, and a general discretion as to their sale. He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer.⁵

^a *Edmunds v. Bushell and Jones*, (1865) L.R. 1 Q.B. 97.

^b *Bell v. Balls*, [1897] 1 Ch. 671.

^c *Woolfe v. Horne*, (1877) 2 Q.B.D. 355.

^d *Rainbow v. Hawkins*, [1904] 2 K.B. 326.

¹ *Hatch v. Taylor*, *supra*; *Butler v. Maples*, *supra*; *Byrne v. Massasoit Packing Co.*, (1884) 137 Mass. 313; *Watts v. Howard*, (1897) 70 Minn. 122; *Trainer v. Morison*, (1886) 78 Me. 160.

² *Walker v. Herring*, (1872, Va.) 21 Gratt. 678; *Johnson v. Buck*, (1872) 35 N.J. L. 338; *Bent v. Cobb*, (1857, Mass.) 9 Gray, 397.

³ *Hulse v. Young*, (1819, N.Y.) 16 Johns. 1; *Elison v. Wulff*, (1887) 26 Ill. App. 616; *Schell v. Stephens*, (1872) 50 Mo. 375.

⁴ But see *Bush v. Cole*, (1863) 28 N.Y. 261.

⁵ *Daylight Burner Co. v. Odlin*, (1871) 51 N.H. 56; *Goodenow v. Tyler*, (1810) 7 Mass. 36; *Randall v. Kehlor*, (1872) 60 Me. 37; *Rice v. Groffmann*, (1874) 56 Mo. 434.

He further has a lien upon the goods for the balance of account as between himself and his principal, and an insurable interest in them. Such is the power of a factor at common law, a power which the principal cannot restrict, as against third parties, by instructions privately given to his agent.^a

By the Factors Act, 1889,^b which consolidates earlier statutes on the subject, the legal power of the factor is extended. Persons who, in good faith, advance money on the security of goods or documents of title are thereby entitled to assume that the possession of the goods,^c or of the documents of title to them, carries with it the power to pledge them; and this is so even though as between the factor and his principal such power is expressly withheld.^d

And so long as the agent is left in possession of the goods, a revocation by the principal to the agent does not prejudice the right of the buyer or pledgee, if the latter has not notice of the revocation at the time of the sale or pledge.¹

456. Brokers. A broker is an agent primarily to establish contractual relations between two parties. Where he is a broker for sale he has not possession of the goods, and so he has not the power thence arising which a factor enjoys. Nor has he any right of action in his own name on contracts made by him.

The forms of a broker's notes of sale may be useful as illustrating what has hereafter to be said with reference to the liabilities of parties where an agent contracts for a principal whose name or whose existence he does not disclose.

When a broker makes a contract he puts the terms into writing and delivers to each party a copy signed by him. The copy delivered to the seller is called the sold note, that delivered to the buyer is called the bought note. The sold note begins "Sold for A to X" and is signed "M broker," the bought note begins "Bought for X of A" and is signed "M broker." But the forms may vary and with them the broker's liability. We will follow these in the sold note.

(1) "Sold for A to X" (signed) "M broker." Here the broker

^a Pickering v. Busk, (1812) 15 East, 38.

^b 52 & 53 Vict. c. 44.

^c Possession by one who has "bought or agreed to buy goods" carries with it this power to pledge: but possession, with an option to buy or return, does not. *Halby v. Matthews*, [1895] A.C. 471.

^d *Weiner v. Harris*, [1910] 1 K.B. 285.

¹ Similar acts are in force in the American states. See Stimson, *Am. St. Law*, §§ 4380-88; *Huffcut*, *Agency*, § 171.

cannot be made liable or acquire rights upon the contract: he acts as agent for a named principal.^{a 1}

(2) "Sold for you to our principals" (signed) "*M* broker." Here the broker acts as agent, but for a principal whom he does not name. He can only be made liable by the usage of the trade if such can be proved to exist.^{b 2}

(3) "Sold by you to me" (signed) "*M*." Here we suppose that the broker has a principal, though his existence is not disclosed, nor does the broker sign as agent. He is personally liable, though the seller may prefer to take, and may take, the liability of the principal when disclosed; and the principal may intervene and take the benefit of the contract.^{c 3}

457. Commission agents. A commission agent is, as was described above, a person employed, not to make contracts between his employer and other parties, but to buy or sell goods for him on the best possible terms, receiving a commission as the reward of his exertions.^{d 4}

458. Del credere agents. A *del credere* agent is an agent for the purpose of sale, and one who also gives (in consideration of a higher remuneration) an undertaking to his employer that the parties with whom he is brought into contractual relations will pay the money which may become due under the contract into which they enter.

He does therefore promise to "answer for the default" of another, and his contract would at first sight appear to require evidence in writing, by reason of § 4 of the Statute of Frauds. The courts have held, however, that where the obligation to answer for another's default is only an incident in a larger contract (i.e., of *del credere* agency), then § 4 has no application, and no note or memorandum in writing is necessary.^{e 5}

^a Fairlie v. Fenton, (1870) L.R. 5 Ex. 169.

^b Fleet v. Murton, (1871) L.R. 7 Q.B. 126; Southwell v. Bowditch, (1876) 1 C.P.D. (C.A.) 374.

^c Higgins v. Senior, (1841) 8 M. & W. 834.

^d Ireland v. Livingston, (1872) L.R. 5 H.L. 407. [See § 449, ante.]

^e Harburg India Rubber Co. v. Martin, [1902] 1 K.B. 778, 786.

¹ Whitney v. Wyman, (1879) 101 U.S. 392; Bonyng v. Field, (1880) 81 N.Y. 159; Grant v. Beard, (1870) 50 N.H. 129.

² Chase v. Debolt, (1845) 7 Ill. 371; Johnston v. Armstrong, (1892) 83 Tex. 325. See Waddell v. Mordecai, (1836, S.C.) 3 Hill, 22.

³ Cream City Glass Co. v. Friedlander, (1893) 84 Wis. 53; Horan v. Hughes, (1903) 129 Fed. 248. See Heffron v. Pollard, (1889) 73 Tex. 96.

⁴ In the United States this term has a much broader usage, and often includes factors with true agency powers.

⁵ Lewis v. Brehme, (1870) 33 Md. 412; Wolff v. Koppel, (1843, N.Y.) 5 Hill, 458; Sherwood v. Stone, (1856) 14 N.Y. 267; Swan v. Nesmith, (1828, Mass.) 7 Pick. 220; National Cordage Co. v. Sims, (1895) 44 Neb. 148.

But the *del credere* agent does not guarantee the performance of the contract otherwise than as regards *payments*; and thus cannot be sued by a vendor of goods whom he has brought into contractual relations with a purchaser, because the purchaser refuses to take delivery.^a

459. Agent cannot sue or be sued. I have said that the agent contracting within his existing power for a named principal drops out of the transaction. As a rule he acquires neither rights nor liabilities on a contract so made.

Plainly he cannot sue; for the party with whom he contracted has been induced by him to look to the named principal, and cannot, unless he so choose, be made liable to one with whom he dealt merely as the mouthpiece of another.^b

And this is so though the professed agent be the real principal. If John Styles agrees to sell his goods to John Doe describing himself as the agent, and the goods as the property, of Richard Roe, he cannot enforce the contract, for it was not made with him.^c 1

With a few exceptions he cannot be sued.^d 2

An agent who makes himself a party to a deed is bound thereby, though he is described as agent. This arises from the formal character of the contract, and the technical rule that "those only can sue or be sued upon an indenture who are named or described in it as parties."^e 3

An agent who contracts on behalf of a foreign principal has, by the usage of merchants, no power to pledge his employer's credit, and becomes personally liable on the contract.^f 4

^a *Gabriel v. Churchill & Sim*, [1914] 3 K.B. 1272.

^b *Bickerton v. Burrell*, (1816) 5 M. & S. 383. ^c *Lewis v. Nicholson*, (1852) 18 Q.B. 508.

^d Parol contracts may be framed so as to leave it uncertain whether the agent meant to make himself personally liable. But these do not affect the rule. *Lennard v. Robinson*, (1855) 5 E. & B. 125.

^e *Beckham v. Drake*, (1841) 9 M. & W. 95.

^f *Armstrong v. Stokes*, (1872) L.R. 7 Q.B. 605.

¹ *Dacey on Parties* (Am. ed. 1879) 165; compare *Boston Ice Co. v. Potter*, (1877) 123 Mass. 28. This is because John Doe contracts to obtain a legal right against Richard Roe, a very different thing from a similar right against John Styles. Had Richard Roe actually undertaken the correlative duty, he would have no power of substituting a duty of John Styles by assignment.

² Where a contract is signed "John W. Fry by Heffron," parol evidence cannot be introduced to show that Heffron signed the name of Fry (a real person) for his own benefit and with intent to bind himself. *Heffron v. Pollard*, (1889) 73 Tex. 96. And see *Kansas Nat. Bank v. Bay*, (1901) 62 Kans. 692.

³ *Briggs v. Partridge*, (1876) 64 N.Y. 357; *Sanders v. Partridge*, (1871) 106 Mass. 556; *Borcherling v. Kats*, (1883) 37 N.J. Eq. 150.

⁴ The presumption is otherwise in the United States. *Kirkpatrick v. Stainer*, (1839, N.Y.) 22 Wend. 244; *Oelricks v. Ford*, (1859, U.S.) 23 How. 49; *Bray v. Kettell*, (1861, Mass.) 1 Allen, 80.

If an agent contracts on behalf of a principal who does not exist or cannot contract, he is personally liable on a contract so made.¹

The case of *Kelner v. Baxter*^a was cited above to show that a company cannot ratify contracts made on its behalf before it was incorporated: the same case establishes the rule that the agent so contracting incurs the liabilities which the company cannot by ratification assume. "Both upon principle and upon authority," said Willes, J., "it seems to me that the company never could be liable upon this contract, and construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable."

460. Remedies against agent who contracts without authority. If a man contracts as agent, but without authority, for a principal whom he names, he does not bind either his alleged principal or himself by the contract:² but the party whom he induced to contract with him has one of two remedies.

(a) If the alleged agent honestly believed that he had a power which he did not possess he may be sued upon a *warranty of authority*.³

This is an implied promise to the other party that in consideration of his making the contract the professed agent undertakes that he is acting with the authority of a principal.

This rule does not apply only to transactions or representations which would result in contract; it extends to any representation of authority whereby one induces another to act to his detriment.^b

"Persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for dam-

^a (1866) L.R. 2 C.P. 175.

^b *Starkey v. Bank of England*, [1903] A.C. 114.

¹ *Patrick v. Bowman*, (1893) 149 U.S. 411; *Lewis v. Tilton*, (1884) 64 Iowa, 220.

² *Ballou v. Talbot*, (1820) 16 Mass. 461; *McCurdy v. Rogers*, (1866) 21 Wis. 199; *Noyes v. Loring*, (1867) 55 Me. 408; *Duncan & Co. v. Niles*, (1863) 32 Ill. 532.

³ *White v. Madison*, (1862) 26 N.Y. 117; *Baltzen v. Nicolay*, (1873) 53 N.Y. 467; *Kroeger v. Pitcairn*, (1882) 101 Pa. 311; *Farmers' Trust Co. v. Floyd*, (1890) 47 Ohio St. 525; *Seeberger v. McCormick*, (1899) 178 Ill. 404, 415-419.

A "warranty of authority" is to be regarded as a warranty of the existence of the operative facts necessary to create in the agent the power he purports to exercise. To say that this warranty is an "implied promise" means only that the law creates a duty in the agent to pay losses caused by his action.

ages for the breach of an implied warranty of authority. This was decided in *Collen v. Wright*,^a and other cases."^b

The liability may be treated — as it has been by the Court of Appeal — as an exception to the general rule of law that "an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another."^c But if that were so the right of action, being no longer based on contract but on wrong, would not survive to the representatives of the injured party.¹

The relation is really one of contract; "the true principle," says Buckley, L.J., in *Yonge v. Toynbee*,^d "as deduced from the authorities, rests, I think, not upon wrong or omission of right on the part of the agent, but upon implied contract." This same case lays down that the warranty is a continuing warranty and therefore the agent is liable even though his power be determined without his knowledge, as by the death or insanity of the principal.

(b) If the professed agent knew that he had not the power which he assumed to possess, he may be sued by the injured party in the action of deceit.²

The case of *Polhill v. Walter*^e is an illustration of this. The defendant accepted a bill as agent for another who had not given him power to do so. He knew that he had not the power, but expected that his act would be ratified. It was not ratified, the bill was dishonored, and the defendant was held liable to an indorsee of the bill as having made a representation of authority false to his knowledge, and falling under the definition of fraud given in a previous chapter.

The reason why the alleged agent should not be made personally liable on such a contract is plain. The man whom he induced to enter into the contract did not contemplate him as the other party of it, or look to any one but the alleged principal. His remedy should be, as it is, for misrepresentation, innocent or fraudulent.

^a (1857) 8 E. & B. 647.

^b *Richardson v. Williamson*, (1871) L.R. 6 Q.B. 276.

^c *Firbank's Exors. v. Humphreys*, (1886) 18 Q.B.D. (C.A.) 62.

^d [1910] 1 K.B. at p. 228.

^e (1832) 3 B. & A. 114.

¹ To the present editor it seems that the Court of Appeal was quite right in this matter. The "contract" is pure fiction. This will be found to be not the only instance where the unsatisfactory rule as to non-survival of tort actions has been avoided by indulging in the fiction of a contract.

² *Noyes v. Loring*, (1867) 55 Me. 408.

III. LEGAL RELATIONS OF THE PARTIES WHERE THE PRINCIPAL IS UNDISCLOSED

1. *Where the name of the principal is not disclosed*

461. General rule. A man "has a right to the benefit which he contemplates from the character, credit and substance of the person with whom he contracts";^a if therefore he enters into a contract with an agent who does not give his principal's name, the presumption is that he is invited to give credit to the agent. Still more if the agent do not disclose his principal's existence. In the last case invariably, in the former case within certain limits, the party who contracts with an agent on these terms gets the benefit of an alternative liability and may elect to sue agent or principal upon the contract.¹

An agent who contracts as agent, but does not disclose the name of his principal, is said to render himself personally liable if the other party to the contract choose to treat him so, but this must depend on the construction of terms. The exceptions to the general rule are wide, and its application in reported cases is not as frequent as might be expected.^b We may state two propositions, which must be taken subject to exceptions to be hereafter mentioned:

462. Contract as agent for unnamed principal. (1) An agent who contracts for an unnamed principal *as agent* will not be personally liable.^c

The agent who describes himself as such in the contract, and signs himself as such, if the contract be in writing, protects himself against liability.

"There is no doubt at all in principle," said Blackburn, J., in *Fleet v. Murton*,^a "that a broker as such, merely dealing as broker and not as purchaser, makes a contract, *from the very nature of things*, between the buyer and seller, and is not himself either buyer or seller, and that consequently where the contract says 'sold to AB' or 'sold to my principals' and the broker signs himself simply as broker he does not make himself by that either the purchaser or seller of the goods."

^a Denman, C.J., in *Humble v. Hunter*, (1848) 12 Q.B. 317.

^b *Thomson v. Davenport*, (1829) 9 B. & C. 78.

^c (1871) L.R. 7 Q.B. 126. And see *Southwell v. Bowditch*, (1876) 1 C.P.D. (C.A.) 874.

¹ *Byington v. Simpson*, (1883) 134 Mass. 169; *Ford v. Williams*, (1858, U.S.) 21 How. 287; *Kayton v. Barnett*, (1889) 116 N.Y. 625; *Hubbard v. Tenbrook*, (1889) 124 Pa. 291.

² *Johnson v. Armstrong*, (1892) 83 Tex. 325. Cf. *Byington v. Simpson*, *supra*.

463. Contract not expressly as agent. (2) An agent who contracts for an unnamed principal, without expressly contracting as agent, will be personally liable.¹

In the absence of words indicating agency, the word "broker" attached to a signature is merely descriptive and does not limit liability, so that if the agent do not by words exclude himself from liability, it may be assumed that one who deals with an agent for an unnamed principal expects and is entitled to the alternative liability of the principal and the agent.²

Even where the agent is distinctly described as such, the usage of a trade, as in *Fleet v. Murton*,³ may make him liable:⁴ so too may the general rule that an agent acting for a foreign principal has no power to pledge his credit.⁵

Where a man has under these circumstances contracted as agent, he may declare himself to be the real principal. The other party to the contract does, no doubt, lose the alternative liability of the agent or the unnamed principal. Yet, if he was willing to take the liability of an unknown person, it is hard to suppose that the agent was the one man in the world with whom he was unwilling to contract; and at any rate the character or solvency of the unnamed principal could not have induced the contract.

Thus in *Schmalz v. Avery*,⁶ Schmalz sued on a contract of charter-party into which he had entered "on behalf of another party" with Avery. He had named no principal, and it was held that he might repudiate the character of agent and adopt that of principal;⁷ and this decision has been followed in a later case.⁸

2. Where the existence of the principal is undisclosed

464. Alternative liability where principal is undisclosed. If the agent acts on behalf of a principal whose existence he does not disclose, the other contracting party is entitled to elect whether he will treat principal or agent as the party with whom

¹ *Hutchinson v. Eaton*, (1884) 13 Q.B.D. 861; *Thomson v. Davenport*, (1839) 9 B. & C. 78.

² (1871) L.R. 7 Q.B. 126.

³ *Barrow v. Dyster*, (1884) 13 Q.B.D. 635, is an instance of conflict between the terms of a contract and the custom of a trade. Hides were purchased through brokers who did not disclose the name of their principals. The selling brokers were to arbitrate in case of difference under the contract. Evidence of a custom of the hide trade which would make them personally liable, was rejected, as inconsistent with the arbitration clause, which would thus have made them judges in their own cause.

⁴ *Armstrong v. Stokes*, (1872) L.R. 7 Q.B. 605.

⁵ (1831) 16 Q.B. 655.

⁷ *Harper v. Vigers*, [1909] 2 K.B. 549.

¹ *Horan v. Hughes*, (1903) 129 Fed. 248; *De Remer v. Brown*, (1901) 165 N.Y. 410; *Amans v. Campbell*, (1897) 70 Minn. 493.

² See *Huffman v. Long*, (1889) 40 Minn. 473; *Paine v. Loeb*, (1899) 96 Fed. 164.

he dealt. The reason of this rule is plain. If *A* enters into a contract with *X* he is entitled at all events to the liability of the party with whom he supposes himself to be contracting. If he subsequently discovers that *X* is in fact the representative of *M* he is entitled to choose whether he will accept the actual state of things, and sue *M* as principal, or whether he will adhere to the supposed state of things upon which he entered into the contract, and continue to treat *X* as the principal party to it.^{a 1}

I have stated the rule of evidence by which a man who has contracted as principal may be shown to be an agent.² Where a contract is ostensibly made between *A* and *X*, *A* may prove that *X* is agent for *M* with a view of fixing *M* with the liabilities of the contract.^{b 3} But *X* cannot, by proving that *M* is his principal, escape the liabilities of a contract into which he induced *A* to enter under the supposition that he (*X*) was the real contracting party.^{c 4} Neither party may escape any liability which he assumed under the contract, but *A* is permitted to show that his rights are wider than the words of the contract would indicate.

The real principal *M* may intervene and sue upon the contract; but *A* may set up against him any defense which would have been good against *X* the agent, and which accrued while *A* still supposed that he was dealing with *X* as principal. Any set-off which *A* may have against *X*, and which accrued while *A* still regarded *X* as principal, may be used against a demand made by *M* the real principal.^{d 5}

465. Alternative liability, how concluded. But the right of the other contracting party to sue agent or principal — to avail himself of an alternative liability — may, in various ways, be so

^a If the other party elect to treat the agent as agent the principal will be bound by all acts which fall within the power usually conferred upon an agent of the character in question. He cannot set up any special instructions limiting the ostensible character of the agency. *Watteau v. Fenwick*, [1892] 1 Q.B. 346.

^b *Higgins v. Senior*, (1841) 8 M. & W. 834.

^c *Trueman v. Loder*, (1840) 11 Ad. & E. 589.

^d *Montagu v. Forwood*, [1893] 2 Q.B. 350.

¹ *Hubbard v. Tenbrook*, (1889) 124 Pa. 291; *City Trust Co. v. Am. Brewing Co.*, (1903) 174 N.Y. 486.

² See *ante*, § 350.

³ *Ford v. Williams*, (1858, U.S.) 21 How. 287; *Huntington v. Knox*, (1851, Mass.) 7 Cush. 371; *Darrow v. Horne Produce Co.*, (1893) 57 Fed. 463; *Wm. Lindeke Land Co. v. Levy*, (1899) 76 Minn. 364.

⁴ *Cream City Glass Co. v. Friedlander*, (1893) 84 Wis. 53; *Babbett v. Young*, (1872) 51 N.Y. 238; *Bryan v. Brazil*, (1879) 52 Iowa, 350.

⁵ *Taintor v. Prendergast*, (1842, N.Y.) 3 Hill, 72; *Peel v. Shepherd*, (1877) 58 Ga. 365; *Stebbins v. Walker*, (1881) 46 Mich. 5; *Gardner v. Allen*, (1844) 6 Ala. 187.

determined, that he is limited to one of the two and has no longer the choice of either liability.

(a) The agent may contract in such terms that the idea of agency is incompatible with the construction of the contract.

Thus, where an agent in making a charter-party described himself therein as owner of the ship, it was held that he could not be regarded as agent, that his principal could not intervene, nor could, by parity of reasoning, be sued.^{a 1}

(b) If the other party to the contract, after having discovered the existence of the undisclosed principal, do anything which unequivocally indicates the adoption of either principal or agent as the party liable to him, his election is determined, and he cannot afterwards sue the other.²

(c) If, before he ascertain the fact of agency, he sue the agent and obtain judgment, he cannot afterwards recover against the principal.³ But merely to bring an action under these circumstances would not determine his rights. "For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other."⁴

(d) Again, if, while exclusive credit is given to the agent, the undisclosed principal pays the agent for the price of goods sold to him, he cannot be sued when he is discovered to be the purchaser.⁴

In *Armstrong v. Stokes*⁴ the defendants employed Messrs. Ryder, a firm of commission agents, to buy goods for them. Messrs. Ryder bought the goods in their own names from Armstrong, who gave credit to them and to no one else. The defendants paid their agents for the goods in the ordinary course

^a *Humble v. Hunter*, (1848) 12 Q.B. 310.

^b Per Lord Cairns, *Kendall v. Hamilton*, (1879) 4 App. Cas. 514.

^c *Priestly v. Fernie*, (1865) 3 H. & C. 984.

^d (1872) L.R. 7 Q.B. 508.

¹ *Winchester v. Howard*, (1867) 97 Mass. 303; *Harner v. Fisher*, (1868) 58 Pa. 453.

² *Barrell v. Newby*, (1904) 127 Fed. 656; *Ranger v. Thalmann*, (1901) 65 N.Y. App. Div. 5, 84 *ib.* 341, *aff'd*, (1904) 178 N.Y. 574.

³ The problem is whether there is a final election between the agent and the principal. Bringing and maintaining an action against one with full knowledge of all the facts may be an election. *Barrell v. Newby*, (1904) 127 Fed. 656. *A fortiori*, going to judgment against one with full knowledge of all the facts. *Kingsley v. Davis*, (1870) 104 Mass. 178; *Codd Co. v. Parker*, (1903) 97 Md. 319. *Contra*: *Beymer v. Bonsall*, (1875) 79 Pa. 298. But going to judgment against the agent in ignorance of the agency is not an election. *Greenburg v. Palmieri*, (1904) 71 N.J. L. 83; *Lindquist v. Dickson*, (1906) 98 Minn. 369; *Brown v. Reiman*, (1900) 48 N.Y. App. Div. 295.

⁴ *Fradley v. Hyland*, (1888) 37 Fed. 49; *Thomas v. Atkinson*, (1871) 38 Ind. 248; *Laing v. Butler*, (1885, N.Y.) 37 Hun, 144.

of business, and a fortnight later the Messrs. Ryder stopped payment, not having paid Armstrong. When it appeared from their books that they had been acting as agents for the defendants, Armstrong claimed to demand payment from the undisclosed principal. It was held that the demand could not be made from "those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be principals, and to whom alone the vendor gave credit."

It is important to note the difference between such a case as this and one in which the existence of the principal is known, though his name is not disclosed. There the other contracting party presumably looks beyond the agent to the credit of the principal. "The essence of such a transaction," said Bowen, J., in *Irvine v. Watson*,^a "is that the seller as an ultimate resource looks to the credit of some one to pay him if the agent does not." If, in such a case, the principal settles accounts with his agent before the ordinary period of credit has expired, he is not thereby discharged; if he were, the seller would be deprived of the liability to which he was induced to look when he entered into the contract.¹

IV. LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT

466. Liability for active deceit. A principal is liable to an action for deceit for the fraud of his agent, if the fraud was committed in the ordinary course of his employment.² The liability of the principal is in no wise different from that of an employer who is responsible for wrongful acts done by those in his service, within the scope of their employment.³ A man is equally liable for the negligence of his coachman who runs over a foot passenger in driving his master's carriage from the house to the stables, and for the fraud of his agent, who, being instructed to obtain a purchaser for certain goods, obtains one by false statements as to the quality of the goods.

It was at one time thought that the principal was not liable unless the agent's fraud was committed for the principal's benefit, and that therefore no action lay against the principal, if the

^a (1880) 5 Q.B.D. 107, (C.A.) 414.

^b *Lloyd v. Grace*, [1912] A.C. 716.

¹ See *Huffcut, Agency*, § 125.

² *Jeffrey v. Bigelow*, (1835, N.Y.) 13 Wend. 518; *Haskell v. Starbird*, (1890) 152 Mass. 117; *Lynch v. Mercantile Co.*, (1883) 18 Fed. 486; *Davies v. Lyon*, (1887) 36 Minn. 427. *Contra*: *Kennedy v. McKay*, (1881) 43 N.J. L. 288; *White v. N.Y. &c. R.*, (1902) 68 N.J. L. 123; *Keefe v. Sholl*, (1897) 181 Pa. 90.

agent, though acting within his actual powers, intended by his fraud to benefit himself alone. This view, which arose from a misapprehension of the judgment of the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank*^a was emphatically repudiated by the House of Lords in *Lloyd v. Grace*.^b The principal is liable for his agent's fraud, committed in the course of and within the scope of his employment, whether it is committed for the benefit of the principal or for the benefit of the agent.

But if the person employed act beyond the scope, actual or apparent, of his employment he no longer represents his employer so as to make him liable in tort or contract. An agent was employed to sell a log of mahogany; he was not authorized to warrant its soundness, but he did so knowing it to be unsound. The employer could not be sued for deceit because the agent had no authority to give a warranty: nor could the contract be avoided, because the parties could no longer be replaced in their previous positions, for the log had been sawn up and partly used.^{c 1}

The rights of the parties may be thus stated.

If the agent commits a fraud in the course of his employment, he is liable, and so is his principal.

If he commits a fraud outside the scope of his authority he would be liable, but not his principal.

In the first case the other party might sue upon the contract, and in either case he would be entitled to avoid the contract subject to the conditions already described.

Where a principal allows his agent to make a statement which he knows, but which the agent does not know, to be false, it would seem difficult to sue either principal or agent for deceit; for the one did not make the statement, and the other honestly believed it to be true.² But the contract could be set aside or resisted on the ground of material misrepresentation if not on the ground of fraud: and it would be strange if the consequences of

^a (1867) L.R. 2 Ex. 259.

^b [1912] A.C. 716.

^c *Udell v. Atherton*, (1861) 7 H. & N. 172.

¹ See *Kennedy v. McKay*, *supra*; *White v. N.Y. &c. R.* *supra*; *Keefe v. Sholl*, *supra*.

² "In an action between vendor and vendee, knowledge possessed by either the principal or agent is, respectively, imputable to each other, and an agent, whose principal has knowledge of latent defects in property proposed to be sold, cannot honestly represent to its intending purchaser that it is free from such defects." *Mayer v. Dean*, (1889) 115 N.Y. 556, 561. See the possible cases analysed in *Huffcut's Agency*, § 152.

fraud did not attach to a principal who knowingly employed an ignorant agent in order to profit by his misrepresentations.^a This view is expressed by the House of Lords in *Pearson v. Dublin Corporation*.^b

"The principal and the agent are one and it does not signify which one of them made the incriminated statement or which of them possessed the guilty knowledge.

"If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation, or which is the person who had the guilty knowledge."

467. Liability for non-disclosure. In the case of a contract *uberrimae fidei*, the principal would seem to be liable to the avoidance of the contract if his agent conceals a material fact. It is said that "the knowledge of the agent is the knowledge of the principal," and it has even been argued that a principal ought not to recover on a policy of insurance because an agent whom he had employed, *but who had not effected the insurance*, knew of facts, materially affecting the risk, which he did not communicate to his employer, and of which the employer was unaware.^c

The House of Lords refused to extend the rule so far.^{d 1} The agent is employed to represent the principal for one or more transactions. What he does in the course of the transaction is the act of his principal; what he knows and does not tell is — if he ought to tell it and if the transaction is carried out — a non-disclosure which may affect his principal's rights. But he represents his principal *for the purpose of the transaction* in question, and if, before it is effected, his power is revoked, the relation of employer and employed ceases to exist.

468. When knowledge of agent is knowledge of principal. In fact the knowledge of the agent is the knowledge of the principal when, and only when, it is imparted to the principal, or the transaction to which the knowledge is material is carried out.² Hence

^a *National Exchange Co. of Glasgow v. Drew*, (1855) 2 Macq. H.L.C. 146.

^b [1907] A.C. 351, 354, 359; and see *Lloyd v. Grace*, [1912] A.C. 716.

^c *Blackburn v. Vigors*, (1886) 17 Q.B.D. (C.A.) 553. ^d (1887) 12 App. Cas. 531.

¹ *Irvine v. Grady*, (1892) 85 Tex. 120; *Union Nat. Bk. v. Ins. Co.*, (1896) 71 Fed. 473.

² Notice to an agent acquired during the transaction is notice to the principal. *Bierce v. Red Bluff Hotel Co.*, (1866) 31 Cal. 160; *Suit v. Woodhall*, (1873) 113 Mass. 391; *Craigie v. Hadley*, (1885) 99 N.Y. 131. Some courts hold that notice acquired before the agency begins is notice to the principal if the knowledge is still present in the agent's mind and he is at liberty to disclose it. *The Distilled Spirits*, (1870, U.S.) 11 Wall. 356; *Fair-*

it follows that if the agent knows that the principal is being defrauded, the principal cannot set aside the contract on the ground of fraud.¹

An agent of an insurance company obtained a proposal for insurance from a one-eyed man who, being also illiterate, signed at the request of the agent a form stating among other things that he was free from any physical infirmity. The agent knew that the insured had but one eye. The insurance was against partial or total disablement; after a while, the insured lost his second eye, and claimed the amount due under a policy for a total disablement. The company resisted the claim, on the ground of the falsehood contained in the proposal; but it was held that the knowledge of the agent was their knowledge and that they were liable.²

¹ *Bawden v. London & Cy. Assurance Co.*, [1892] 2 Q.B. 524.

field Sav. Bk. *v.* Chase, (1881) 72 Me. 226; *Constant v. University of Rochester*, (1889) 111 N.Y. 604; but see *contra*, *Houseman v. Girard & Co. Ass'n*, (1876) 81 Pa. 256; *McCormick v. Joseph*, (1887) 83 Ala. 401.

² But *contra* if the agent is a party to the fraud or acting adversely to the principal. *Allen v. South Boston Ry.*, (1889) 150 Mass. 200; *Gunster v. Scranton & Co.*, (1897) 181 Pa. 327; *Thomson-Houston Elec. Co. v. Capitol Traction Co.*, (1894) 65 Fed. 341.

³ The principal is also entitled to the benefit of the knowledge of his agent as against the third party. *Haines v. Starkey*, (1901) 82 Minn. 230.

CHAPTER XIX

Determination of Agent's Power

AN agent's power may be determined in any one of three ways: by agreement; by change of status; or by death.

1. *Agreement and revocation*

469. Determination of agent's power by agreement or by revocation. The relation of principal and agent is founded on mutual consent, and may be brought to a close by the same process which originated it, the agreement of the parties.

Where this agreement is expressed by both parties, or where, at the time the power was given, its duration was fixed, the matter is obvious and needs no discussion.

Where power is determined by revocation it must be borne in mind that the right of either party to bring the relation to an end by notice given to the other is a term in the original contract of employment.¹

But the principal's power and privilege of revocation are affected by the interests (1) of third parties, (2) of the agent.

470. Effect of revocation as to third parties. A principal cannot privately limit or revoke a power which he has allowed his

¹ The principal's power of revocation does not necessarily depend upon the "original contract of employment." Indeed there may have been no such contract. If *P* says to *A*, "I empower you to buy a barrel of flour for me," this is no contract, and yet *A* has the power of an agent. Such power is revocable at will by *P*. If *P* and *A* make a contract of employment as a buying agent at a salary for a fixed time, this likewise operates to create in *A* the power of an agent; but in addition it creates rights and duties. This contract may expressly reserve to *P* the power and privilege of revoking *A*'s power as an agent and even of revoking *A*'s right to salary. If there is no such express provision, *P* nevertheless has the legal power to terminate the agent's power. If he notifies *A* not to buy thereafter on *P*'s account (and also notifies all third parties whom *P* has theretofore led to believe that *A* is *P*'s agent), *A*'s power is thereby extinguished, and purchases thereafter made by him in *P*'s name will be void. This revocation also extinguishes *A*'s previous conditional right to salary, for now he can no longer fulfill the condition precedent. However, *P* did not have the legal *privilege* of revoking; he was under a *duty* not to revoke, and his breach of this duty gives to *A* a secondary right to damages.

The principal has the power of revocation in all cases except where the agent's power is said to be "coupled with an interest." See § 471, *post*.

agent publicly to assume. He will be bound by the acts of the agent which he has given other persons reason to suppose are done by his authority.

The case of *Debenham v. Mellon*^a is a good illustration of the nature and limits of the power of revocation.

A husband who supplied his wife with such things as might be considered necessities for her forbade her to pledge his credit; any power she might ever have enjoyed for that purpose was thereby determined. She dealt with a tradesman who had not before supplied her with goods on her husband's credit and had no notice of his refusal to authorize her dealings. He supplied these goods on the husband's credit and sued him for their price. It was held that the husband was not liable, and the following rules were laid down in the judgments given.

(a) Marriage does not of itself create by implication a power from the husband to the wife to pledge the husband's credit; except in such cases of necessity as we have described above.¹

The wife therefore can only be constituted her husband's agent by express authority or by such conduct on his part as would *estop* him from denying the agency.

(b) Where the husband has habitually ratified the acts of his wife in pledging his credit, he cannot, as regards those whom he has thus induced to look to him for payment, terminate her power without notice.

"If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume."^b

(c) In the absence of any power arising from his own conduct, already known to persons dealing with his wife, the husband can put an end to such power as he may have given her privately, and can do so without notice to persons so dealing.

"The tradesman must be taken to know the law; he knows that the wife has no authority in fact or in law to pledge the husband's credit even for necessities, unless he expressly or impliedly gives it her, and that what the husband gives he may take away."^c

^a (1880) 5 Q.B.D. 394; 6 App. Cas. 24. ^b *Debenham v. Mellon*, (1880) 5 Q.B.D. 403.
^c *Per Thesiger, L.J.*, 5 Q.B.D. 403.

¹ See *ante*, §§ 442, 444. And then the operative fact is failure to support, not marriage alone.

The case of husband and wife is perhaps the best, as it is the strongest, illustration of the limits within which the principal may revoke an agency consistently with the rights of third parties.¹

471. Power coupled with an interest. The power and privilege of revocation may be expressly or impliedly limited by the duty of the employer to save or to indemnify the agent from loss occurring in consequence of the employment.

The rule laid down that "a power coupled with an interest is irrevocable" is explained by Wilde, C.J., in *Smart v. Sanders*,^a to mean that "where an agreement is entered into on sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority, such an authority is irrevocable."² That is what is usually meant by an authority coupled with an interest." An illustration of the application of this principle is to be found in *Carmichael's case*.^b But the rule has a somewhat wider application, as appears from the language of Bowen, L.J., in *Read v. Anderson*,^c where the revocation of the agent's power and privilege of carrying out a contract would have involved an injury to the agent which must have been in contemplation of the parties when the contract of employment was made.

"There is a contract of employment between the principal and the agent which expressly or by implication regulates their relations; and if as part of this contract the principal has expressly or impliedly bargained not to revoke the authority and to indemnify the agent for acting in the ordinary course of his trade and business he cannot be allowed to break his contract."^d

^a (1846) 5 C.B. 917. ^b [1896] 2 Ch. 648. ^c (1884) 13 Q.B.D. 779. ^d 13 Q.B.D. 782.

¹ Notice of revocation is necessary to protect third parties. *Claffin v. Lenheim*, (1876) 66 N.Y. 301; *Fellowes v. Hartford &c. Co.*, (1871) 38 Conn. 197; *Tier v. Lampson*, (1882) 35 Vt. 179. But if the agency be for a single act, notice is unnecessary after the performance of that act. *Watts v. Kavanagh*, (1861) 35 Vt. 34.

² This is probably too broad a statement under the American law. *Blackstone v. Buttermore*, (1866) 53 Pa. 266; *Chambers v. Seay*, (1882) 73 Ala. 372; *Stier v. Ins. Co.*, (1893) 58 Fed. 843.

³ *Hunt v. Rousmanier*, (1823, U.S.) 8 Wheat. 174; *Hess v. Rau*, (1884) 95 N.Y. 359; *Roland v. Coleman*, (1886) 76 Ga. 652; *Kelly v. Bowerman*, (1897) 113 Mich. 446; *Muth v. Goddard*, (1903) 28 Mont. 237; *Huffcut, Agency*, § 72. If revocation by the principal would be a breach of his contract with the agent, he does not have the legal *privilege* of revoking. It does not follow from this, however, that he lacks the legal *power* to revoke, but if he exercises his power he will be bound to pay damages. There are certain powers "coupled with an interest" that are truly irrevocable. These are usually cases where the agent has acquired a property interest and his *power* is one of the legal relations composing that interest. See *Hunt v. Rousmanier*, *supra*.

2. Change of status

472. Bankruptcy and Marriage. Bankruptcy of the principal determines, and before 1883 marriage of the principal, if a woman, determined, a power given while the principal was solvent, or sole. ^{a 1}

473. Insanity. It seems no longer open to doubt since the recent case of *Yonge v. Toynbee*^b that insanity extinguishes a power properly created while the principal was sane. In that case the defendant, after instructing his solicitors to defend on his behalf a threatened action, became insane. The solicitors, in ignorance of this, duly entered an appearance to the writ, and took all necessary steps on their client's behalf. When the defendant's insanity became known to the plaintiff, he sought to have the appearance and all subsequent proceedings struck out, and to make the solicitors personally liable for costs incurred, on the ground that their power to act had been determined by the defendant's insanity; and the Court of Appeal decided in his favor, holding that the solicitors had warranted the existence of a power which they had ceased to possess.

It is difficult, if not impossible, to reconcile this decision with that of *Drew v. Nunn*,^c which was not considered in *Yonge v. Toynbee*. The defendant there, being at the time sane, gave power to his wife to deal with the plaintiff and afterwards became insane. The wife continued to deal with the plaintiff and gave no notice of her husband's insanity; the defendant recovered and resisted payment for goods supplied while he was insane. The Court of Appeal did not expressly decide how far insanity affected the continuance of an agent's power, but held that "the defendant, by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act on his behalf, and that until the plaintiff had notice that this authority was revoked he was entitled to act on the defendant's representations."

Yonge v. Toynbee may be taken to settle, beyond doubt, that in *Drew v. Nunn* the wife's agency had been determined, the husband being held liable, not because his wife was in fact his

^a *Minett v. Forester*, (1811) 4 Taunt. 541; *Charnley v. Winstanley*, (1804) 5 East, 266.

^b [1910] 1 K.B. 215.

^c (1879) 4 Q.B.D. 661.

¹ *In re Daniels*, (1875, U.S.) 6 Biss. 405; *Rowe v. Rand*, (1887) 111 Ind. 206; *Hall v. Bliss*, (1875) 118 Mass. 554; *Wambole v. Foote*, (1878) 2 Dak. 1; *Judson v. Sierra*, (1858) 22 Tex. 365.

agent, but because he was estopped from alleging that she was not. But if the insane person cannot confer a power, neither can he revoke a power already given; and it seems a strange application of the doctrine of estoppel that a man should not be permitted to deny the existence of a power which is now settled to be terminated, and which, if not terminated, he could not (by reason of his misfortune) revoke. Again, it seems to follow from *Yonge v. Toynbee* that the plaintiff in *Drew v. Nunn* might have successfully sued the wife on a breach of warranty of authority.¹ Clearly, however, if the principal is liable on the contract, the agent can never be liable for such a breach of warranty, and the converse proposition must be equally true.²

For these reasons, therefore, it seems best to regard *Drew v. Nunn* as inconsistent with the later decision and as no longer good law on the point which it purports to decide. Insanity must be held to determine an agent's power for all purposes, as soon as it occurs, whether the third party have notice of it or not, in the same way that death of the principal (as is explained below) determines it. The burden cast upon the agent is no heavier in this than in any other case of "warranty of authority"; for the liability rests wholly upon the assumption that the agent honestly believed himself to possess a power which, unknown to him, had determined.³

3. Death of principal

474. Death of principal extinguishes agent's power. The death, or (if the principal is an artificial entity like a corporation) the dissolution, of the principal determines at once the power of the agent,⁴ leaving the third party to his remedy against the agent for breach of warranty of authority in the case of contracts entered into by him in ignorance of the principal's death.⁵ It was once thought that in such cases an agent would only be liable if his ignorance of the principal's death was due to some default or omission of his own. But in so far as *Smout v.*

¹ *Rainbow v. Howkins*, [1904] 2 K.B. 322.

² This statement should be qualified in respect of powers of attorney expressed to be irrevocable under §§ 8 and 9 of the Conveyancing Act of 1882. See 44 & 45 Vict. c. 41, § 47, and 45 & 46 Vict. c. 39, §§ 8, 9. But these exceptions are of a very limited character and do not affect the principle laid down in the text.

³ *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43.

⁴ See *ante*, § 460, note 3.

⁵ See *Davis v. Lane*, (1839) 10 N.H. 156; *Matthiessen & Co. v. McMahon*, (1876) 38 N.J. L. 536; *Merritt v. Merritt*, (1899) 43 N.Y. App. Div. 68; *Chase v. Chase*, (1904) 163 Ind. 178.

Ilbery^a was an authority for this proposition, it has now been expressly overruled by *Yonge v. Toynbee*,^b cited above. The agent is liable whether he represents himself as having a power which he has never possessed, or as having a power which has determined without his knowledge, even though he had no means of finding it out.^{c 1}

^a (1842) 10 M. & W. 1.

^b [1910] 1 K.B. 215.

^c The judgment of Stirling, J., in *Salton v. New Beeston Cycle Co.*, referred to in the text, is also overruled on this point; it was held there that an innocent agent of a company whose power had determined by the company's dissolution, was not liable.

¹ The death of the principal extinguishes the power of the agent, and any contract thereafter made is a nullity. *Weber v. Bridgman*, (1889) 113 N.Y. 600; *Farmers' &c. Co. v. Wilson*, (1893) 139 N.Y. 284; *Long v. Thayer*, (1893) 150 U.S. 520; *Lewis v. Kerr*, (1864) 17 Iowa, 73; *Moore v. Weston*, (1904) 13 N.Dak. 574. *Contra*, where the act is not necessarily to be done in the principal's name: *Ish v. Crane*, (1858) 8 Ohio St. 520, (1862) 13 Ohio St. 574; and see *Deweese v. Muff*, (1898) 57 Neb. 17; *Meinhardt v. Newman*, (1904) 71 Neb. 532. A power coupled with an interest is not terminated by either death or insanity of the principal.

PART VI

CHAPTER XX

Contract and Quasi-Contract

475. Meaning and nature of Quasi-Contract. It is necessary to touch on some forms of obligation, called quasi-contract for want of a better name, because they acquired, for purposes of pleading, the form of agreement.¹

In early notions of contract, whether in Roman^a or in English law, we must not look for an analysis of agreement, as emanating from offer and acceptance. The fact that one man had benefited at the expense of another under circumstances which called for a readjustment of rights might give rise to the action of debt. And this was the remedy, not only for breaches of contract based on executed consideration where such breach resulted in an ascertained money claim, but for any case where statute, common law, or custom laid a duty upon one to pay an ascertained sum to another.

The action of *assumpsit*, on the other hand, was primarily an action to recover an unliquidated sum, or such damages as the breach of a promise had occasioned to the promisee.

But there were certain inconveniences attaching to the action of debt. The defendant might "wage his law,"^b and the action was then determined, not upon the merits, but by a process of compurgation, in which the defendant came into court and declared upon oath that he did not owe the debt, and eleven respectable neighbors also declared upon oath that they believed him to speak the truth.

Again, the technical rules of pleading forbade the inclusion in

^a Thus Gaius, after illustrating the nature of the contract *Re*, by the instance of *Mutuum* or loan for consumption, goes on to say, "is qui non debitum accepit ab eo qui per errorem solvit, re obligatur." Gaius, 3. § 91. By the time of Justinian this legal relation had been definitely assigned to the province of Quasi-Contract. Institutes, iii. 27. 6.

^b Blackstone, Comm. iii. 341.

¹ For a discussion of the difference between a true contract resting on assent and a fictional contract created by law, see *Hertsog v. Hertsog*, (1857) 29 Pa. 465; *Dusenbury v. Speir*, (1879) 77 N.Y. 144; *Columbus &c. Ry. v. Gaffney*, (1901) 65 Ohio St. 104; Keener on Quasi-Contracts, Ch. I.

the same suit of causes of action arising from debt and from *assumpsit*, of actions for liquidated and for unliquidated damages; for the one was based upon contract real or feigned,^a the other upon a form of wrong, the *non-feasance* of an undertaking.

Assumpsit therefore was preferred to *debt* as a form of action, and, after a while, by the pleader's art, a money debt was stated in the form of an *assumpsit*, or undertaking to pay it. First it was decided in *Slade's case*^b that an action might be maintained in *assumpsit*, though the contract was a bargain for goods to be sold, resulting in a liquidated claim or *debt*. Then, where the breach of a contract resulted in such a claim, the plaintiff was enabled to declare in the form of a short statement of a debt, based upon a request by the defendant for work to be done or goods to be supplied, and a promise to pay for them. This was settled in the last twenty-five years of the seventeenth century. Thenceforth a man might state claims arising from contract variously in the same suit — as a special agreement which had been broken — and as a debt arising from agreement and hence importing a promise to pay it.^c

Such a mode of pleading was called an *indebitatus* count, or count in *indebitatus assumpsit*; the remedy upon a special contract which resulted in a liquidated claim was now capable of being stated as a debt with the addition of a promise to pay it. In this form it was applied to the kinds of liability which, though devoid of the element of agreement, gave rise to the action of debt, and thence in all cases where *A* was liable to make good to *X* a sum gained at *X*'s expense.^{d 1}

Thus for the convenience of the remedy certain liabilities have been made to figure as though they sprang from contract, and have appropriated the form of agreement. The distinction between *assumpsit* and debt was practically abolished by the Common Law Procedure Act (1852).^e The plaintiff was no longer required to specify the form in which his action was brought; he

^a Exception has been taken to this statement on the ground that the cause of action in debt was "the creditor's supposed property in the debt." (L.Q.R., vol. 23, p. 125.) But the learning of the thirteenth century is not always applicable to the practice of the eighteenth. The liability arising from debt is treated as contractual by Fitzherbert (*de Natura Brevium*, 262), and the reason for non-joinder of debt and *assumpsit* is given, as I have stated it, in Bacon's Abridgment, i. 30, and Chitty on Pleading, vol. i. 223. W. R. A.

^b (1602) 4 Co. Rep. 92.

^c See expressions of Holt, C.J., quoted in *Hayes v. Warren*, (1732) 2 Str. 932.

^d *Moses v. Macferlan*, (1760) 2 Burr. 1005.

^e 15 & 16 Vict. c. 76.

¹ See §§ 12-15, 69-71, *ante*; Ames, "History of Assumpsit," 2 *Harvard Law Review*, 1, 53, reprinted in Woodruff's Cases on Quasi-Contract, pp. 653-683.

was allowed to join various forms of action in the same suit, and might omit the feigned promise from the statement of the cause of action. The form of pleading, in such cases as resolved themselves into a simple money claim, was reduced to a short statement of a debt due for money paid or received; and now the Judicature Act has abolished formal pleadings, and has substituted for the *indebitatus* counts a simple indorsement upon the writ of summons.

In deference to their historical connection with contract, I will notice legal relations which once, in the pleader's hands, wore the semblance of offer and acceptance.¹

Such relations may arise from the judgment of a court of competent jurisdiction, or from the acts of the parties.

As to the former, it is enough to say that the judgment of a court of competent jurisdiction, ordering a sum of money to be paid by one of two parties to another, is not merely enforceable by the process of the court, but can be sued upon as creating a debt between the parties, whether or no the court be a court of record.^{a 2}

The acts of the parties may bring about this obligation either (1) from the admission by *A* of a claim due to *X* upon an account stated, or (2) from the payment by *A* of a sum which *X* ought to have paid, or (3) from the acquisition by *A* of money which should belong to *X*.

(1) An account stated is an admission by one who is in account with another that there is a balance due from him. Such an admission imports a promise to pay upon request, and creates a liability *ex contractu*.^{b 3}

^a *Williams v. Jones*, (1845) 13 M. & W. 628.

^b *Irving v. Veitch*, (1837) 3 M. & W. 106; *Hopkins v. Logan*, (1839) 5 M. & W. 241.

¹ In the admirable treatise by Professor Keener on Quasi-Contracts, the author divides quasi-contracts into three groups: (1) those founded upon a record, e.g., a judgment; (2) those founded upon a statutory, official, or customary duty, e.g., the statutory obligation to pay for a service, like compulsory pilotage, the obligation of a sheriff, or the obligation of a common carrier or innkeeper; (3) those founded upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another, e.g., the obligation of an infant or lunatic to pay for necessities, the obligation of a person to refund money paid under mistake or duress, the obligation of a person to pay for benefits conferred under a contract which through no fault of the plaintiff is incapable of full performance, the obligation of indemnity or contribution, and so on. Ch. I.

² *Andrews v. Montgomery*, (1821, N.Y.) 19 Johns. 162; *First Nat. Bk. v. Van Vooris*, (1895) 6 S.Dak. 548. A judgment is not a contract. *O'Brien v. Young*, (1884) 95 N.Y. 428; *Morley v. Lake Shore Ry.*, (1892) 146 U.S. 162.

³ An account stated rests on assent, and is often in the nature of a com-

(2) It is a rule of English law that no man "can make himself the creditor of another by paying that other's debt against his will or without his consent."^a

But if *A* requests or allows *X* to take up a position in which he is compelled by law to discharge *A*'s legal liabilities, the law imports a request and promise made by *A* to *X*, a request to make the payment, and a promise to repay.¹

If one of several co-debtors pays the entirety of the debt he may recover from each of the others his proportionate share. In such a case a request to pay and a promise to repay were feigned in order to bring plaintiff within the remedy of *assumpsit*, and he could recover his payment from his co-debtors as money paid to their use.^b

So, too, a man who in the course of business leaves his goods on another's premises and has to pay that other's rent to prevent a distress upon his goods, may in like manner recover his money.^c

We might multiply instances of this kind of liability, but we must not forget that legal liability incurred by *X* on behalf of *A* without any concurrence or privity on the part of *A*, will not entitle *X* to recover for money which under such circumstances he may pay to *A*'s use. The liability must have been in some manner cast upon *X* by *A*. Otherwise the mere fact that *X* has paid under compulsion of law what *A* might have been compelled to pay, will give to *X* no right of action against *A*. *X* may have been acting for his own benefit and not by reason of any request or act of *A*.^d

^a Per Willes, J., in *Johnson v. Royal Mail Steam Packet Co.*, (1867) L.R. 3 C.P. 43.

^b *Kemp v. Finden*, (1844) 12 M. & W. 421. ^c *Exall v. Partridge*, (1799) 8 T.R. 308.

^d *England v. Marsden*, (1866) L.R. 1 C.P. 529.

promise. *Dunham v. Griswold*, (1885) 100 N.Y. 224. If in parol it has no effect where the original claim is barred and the statute requires a written acknowledgment to revive it. *Hoyt v. Wilkinson*, (1830, Mass.) 10 Pick. 31. The assent may be implied. *Leather Mfrs. Bk. v. Morgan*, (1886) 117 U.S. 96.

¹ *Hogg v. Longstreth*, (1881) 97 Pa. 255; *Ticonic Bank v. Smiley*, (1847) 27 Me. 225; *Van Santen v. Standard Oil Co.*, (1880) 81 N.Y. 171. Of course, it is customary to say that the law "imports" a promise in these cases. In some instances a promise may be inferred *in fact*, but in other cases it is mere fiction and it is far better to say that society creates a duty to repay — a duty based not in the least upon consent of the debtor.

² Contribution and indemnity are not founded upon true contract. *Tobias v. Rogers*, (1855) 13 N.Y. 59, *Bailey v. Bussing*, (1859) 28 Conn. 455; *Chipman v. Morrill*, (1862) 20 Cal. 131; *Golsen v. Brand*, (1874) 75 Ill. 148.

³ *Wells v. Porter*, (1831) 7 Wend. 119.

⁴ See criticism of *England v. Marsden* in Keener, *Quasi-Contracts*, pp. 390-95. The doctrine of this paragraph is really opposed to that of the

(3) There are many cases in which *A* may be required to repay to *X* money which has come into his possession under circumstances which disentitle him to retain it.

This class of cases, though at one time in the hands of Lord Mansfield it threatened to expand into the vagueness of "moral obligation," is practically reducible to two groups of circumstances now pretty clearly defined.^{a 1}

The first of these are cases of money obtained by wrong, such as payments under contracts induced by fraud, or duress;² the second are cases of money paid under such mistake of fact as creates a belief that a legal liability rests on the payer to make the payment.^{b 3} Such cases lie outside the limits of our subject.⁴

^a *Moses v. Macferlan*, (1760) 2 Burr. 1010.

^b *Marriot v. Hampton*, (1797) 2 Sm. L.C. 449 and notes thereto. The liability to repay money paid for a consideration which has wholly failed is sometimes classed among the foregoing obligations, but is based upon genuine contract, though shortly stated in the form of an *indebitatus* count.⁵

* The duty to repay under these circumstances should not be classed as contractual unless provided for in terms. It is a duty that differs from the *primary* contractual duty requiring some particular performance. Also, it differs from the *secondary* legal duty to pay damages for breach; for failure of consideration is not always a breach, and even in cases where it is a breach the duty to pay unliquidated damages is not identical with the alternative duty to make restitution of value received.

paragraph just preceding. In the United States there are many cases where there was no "concurrence or privity on the part of *A*." Quasi-contract is the very field where, as Lord Mansfield saw, the law is most rapidly expanding to include new moral obligations as soon as they become settled in the *mores* of society.

¹ The American courts are much inclined to follow Lord Mansfield and are more liberal in creating quasi-contractual duties than are the English courts to-day.

² *Carew v. Rutherford*, (1870) 106 Mass. 1; *Swift Co. v. United States*, (1884) 111 U.S. 22; *Cook v. Chicago R.*, (1890) 81 Iowa, 551; *Nat. Trust Co. v. Gleason*, (1879) 77 N.Y. 400; *Stephens v. Board of Education*, (1879) 79 N.Y. 183; *Duval v. Wellman*, (1891) 124 N.Y. 156; *Galusha v. Sherman*, (1900) 105 Wis. 263.

³ *Baltimore & S.R. v. Faunce*, (1847, Md.) 6 Gill, 68; *Appleton Bank v. McGilvray*, (1855, Mass.) 4 Gray, 518; *Mayer v. New York*, (1875) 63 N.Y. 455; *Wood v. Sheldon*, (1880) 42 N.J. L. 421; *McGoren v. Avery*, (1877) 37 Mich. 120; *Mansfield v. Lynch*, (1890) 59 Conn. 320.

⁴ For collections of authorities upon this subject, see casebooks on Quasi-Contracts by Scott, Thurston, and Woodruff.

APPENDIX

FORM OF CHARTER-PARTY

19

Charter-Party,

IT IS THIS DAY MUTUALLY AGREED, between
of the good Ship or Vessel called the
of the measurement of
Tons Register, or thereabouts, and

Merchant,
that the said ship being tight, staunch, and strong, and in
every way fitted for the Voyage, shall with all convenient
speed, sail and proceed to

or as near thereunto as she may safely get, and there load
from the factors of the said Merchant a full and complete
cargo

*which is to be brought to and taken from alongside at Merchant's
Risk and Expense, and not exceeding what she can reason-
ably stow and carry over and above her tackle, apparel, pro-
visions, and furniture, and being so loaded shall therewith
proceed to*

or as near thereunto as she may safely get, and deliver the
same on being paid freight.

*Restraint of Princes and Rulers, the Act of God, the King's
Enemies, Fire, and all and every other Dangers and Accidents
of the Seas, Rivers, and Navigation of whatever Nature and
Kind soever, during the said Voyage, always excepted.*

Freight to be paid on the right delivery of the cargo.
days to be allowed the said Merchant (if the
Ship be not sooner despatched), for

and days on Demurrage^a over and above
the said laying days at £ per day.

^a It is usual to fix a certain number of days, called "*lay days*," for the loading and unloading of the ship. Beyond these the merchant may be allowed to detain the ship, if need be, on payment of a fixed sum *per diem*, such additional days being in fact lay days that have to be paid for: *Wilson v. Thorsen*, [1910] 3 K.B. 405. Both the detention and the payment are called *Demurrage*. "*Demurrage*" is really agreed or liquidated damages for each day's detention. If no rate of demurrage is agreed, or if the ship is detained beyond the specified number of "*days on demurrage*," the shipowner has a claim for unliquidated damages (called "*damages for detention*"), i.e., what he can prove he has in fact lost by the delay.

Penalty for non-performance of this agreement, estimated amount of freight.^a

Witness to the signature of }
 Witness to the signature of }

FORM OF BILL OF LADING FOR GOODS SHIPPED ON SAILING VESSELS^{b 1}

~~Shippers~~ in good Order and well conditioned by
 in and upon the good Ship called the
 whereof is Master for this present Voyage
 and now riding at Anchor in the and bound for
 to say

being marked and numbered as in the Margin, and are to be
 delivered in the like good order and well conditioned at the
 aforesaid Port of

*(the Act of God, the King's Enemies, Fire, and all and every
 other Dangers, and Accidents of the Seas, Rivers, and Naviga-
 tion of whatever nature and kind soever excepted) unto*

or to Assigns he or they paying Freight for the said
 Goods

with Primage and Average accustomed.^c In Witness
 whereof the Master or Purser of the said Ship hath affirmed

^a The inveterate conservatism of merchants appears to be the only reason for the retention of this clause in charter-parties; for the "penalty" is of course unenforceable as such (*ante*, § 407), only the actual damage suffered being recoverable. Hence it was described as a "brutum fulmen" by Blackburn, J., in *Godard v. Gray*, (1870) L.R. 6 Q.B. 139, 148. It does not even limit the damages recoverable to the estimated amount of freight, if in fact the damages are greater: *Wall v. Rederiaktiebolaget Luggude*, [1915] 3 K.B. 66, where "penalty for non-performance of this agreement, proved damages not exceeding estimated amount of freight" was said to be only the common form of clause "writ large."

^b It would be difficult at the present day to find in actual use a bill of lading in so simple a form as the above. Those now used are very much more complicated, and in particular the list of "excepted perils" is very greatly increased.

^c *Primage* is a small customary payment to the master, and *Average* here means small necessary payments made by the master and repaid him by the merchant. Both are practically obsolete, though the clause is still sometimes printed in the above form.

Particular Average means the incidence of loss from damage to any part of ship or cargo

¹ For uniform bill of lading see Porter, *Law of Bills of Lading*, § 553.

to Bills of Lading all of this Tenor and Date the one of
 which Bills being accomplished the other to stand void.
 Dated in

FORM OF POLICY-OF MARINE INSURANCE¹

S. G. ~~Be it known that~~

— as well in own Name, as for and in the Name and Names of
 £ all and every other Person or Persons to whom the same doth,
 — may, or shall appertain in part or in all, doth make assurance,
 and cause

and them and every of them, to be insured, lost or not
 lost, at and from

upon any kind of Goods and Merchandises, and also upon the
 Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and
 other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present voyage,

or whosoever else shall go for Master in the said Ship, or
 by whatsoever other Name or Names the said Ship, or the Mas-
 ter thereof is or shall be named or called, beginning the Advent-
 ure upon the said Goods and Merchandises from the loading
 thereof aboard the said Ship

upon the said Ship, &c.

and shall so continue and endure, during
 her Abode there, upon the said Ship, &c.; and further, until the
 said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods
 and Merchandises whatsoever, shall be arrived at

upon the said Ship, &c., until she hath moored at Anchor Twenty-
 four Hours in good Safety, and upon the Goods and Merchan-
 dises, until the same be there discharged and safely landed; and
 it shall be lawful for the said Ship, &c., in this Voyage to proceed
 and sail to and touch and stay at any Ports or Places whatsoever
 without Prejudice to this Insurance.

The said Ship, &c., Goods and Merchandises, &c., for so much
 as concerns the Assured, by Agreement between the Assured and
 Assurers in this Policy, are and shall be valued at

Covering the Adventures and Perils which we the Assurers are con-
 tented to bear and to take upon us in this Voyage, they are, of the Seas,
 Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters

upon the individual owner or his insurer, and is equivalent to partial, as opposed to total
 loss.

General Average means the apportionment of the loss among all the parties interested in
 ship or cargo in proportion to their interest where the loss is caused intentionally and for the
 common safety, as by cutting away masts or throwing cargo overboard.

¹ See Richards on Insurance, p. 600.

of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us the Insurers, that this writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the assured at and after the Rate of

IN WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in

N. B. — Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent.; unless general, or the Ship be stranded.

FORM OF INLAND BILL OF EXCHANGE

£100.			OXFORD, 1st January, 1916.
Three months after date	pay	to Mr.	JOHN STYLES or order the
sum of one hundred pounds	for	value	received.
To RICHARD ROM, Esq.	Accepted payable at the Old Bank, Oxford. Richard Rom.		JOHN DOM.

INDORSEMENT IN BLANK OF ABOVE BILL

<i>John Styles</i>

(1) SPECIAL INDORSEMENT AND (2) INDORSEMENT IN BLANK BY INDORSEE

<i>Pay William Smith or order John Styles William Smith</i>

FORM OF PROMISSORY NOTE

OXFORD, 1st <i>January</i> , 1916.
£100. I promise to pay to RICHARD ROE or order at the Old Bank, Oxford, six months after date the sum of £100, for value received. <div style="text-align: right;">JOHN DOE.</div>

NOTE. — These instruments require an *ad valorem* stamp.

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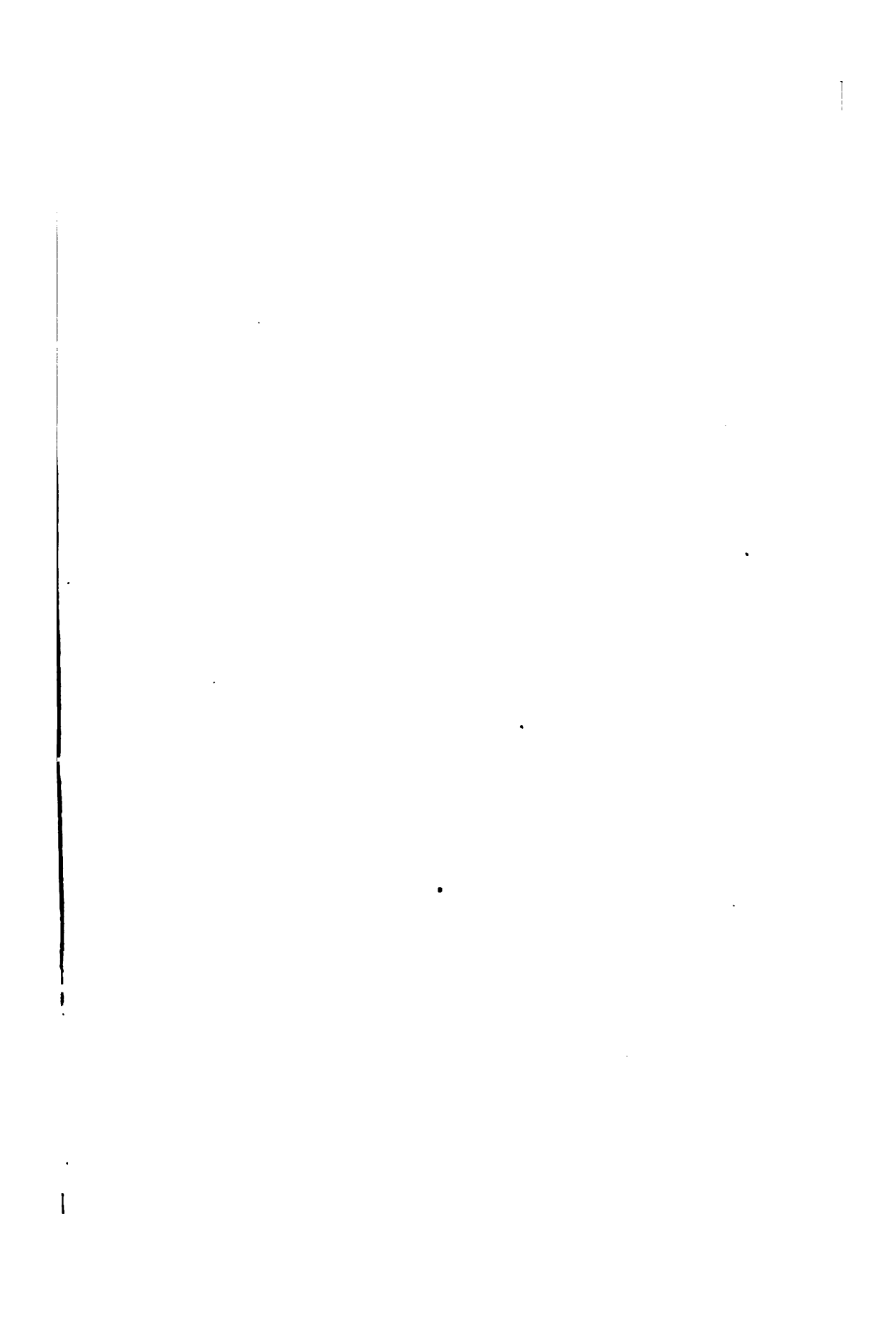
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